DOCKET

No. 08-310
Title: Polar Tankers, Inc., Petitioner
v.
City of Valdez, Alaska
Docketed: September 9, 2008
Lower Ct: Supreme Court of Alaska
Case Nos.: (S-12218/12223)
Decision Date: April 25, 2008
Questions Presented

Date	Proceedings and Orders
Jul 14 2008	Application (08A46) to extend the time to file a petition for a writ of certiorari from July 24, 2008 to September 22, 2008, submitted to Justice Kennedy.
Jul 22 2008	Application (08A46) granted by Justice Kennedy extending the time to file until September 8, 2008.
Sep 8 2008	Petition for a writ of certiorari filed. (Response due October 9, 2008)
Sep 26 2008	Order extending time to file response to petition to and including November 10, 2008.
Nov 10 2008	Brief of respondent City of Valdez, Alaska in opposition filed.
Nov 25 2008	DISTRIBUTED for Conference of December 12, 2008.
Nov 25 2008	Reply of petitioner Polar Tankers, Incorporated filed. (Distributed)
Dec 12 2008	Petition GRANTED.
Jan 16 2009	Consent to the filing of amicus curiae briefs in support of either or neither party received from counsel for the respondent.
Jan 26 2009	SET FOR ARGUMENT ON Wednesday, April 1, 2009.
Jan 26 2009	Joint appendix filed. (Statement of costs filed)
Jan 26 2009	Brief of petitioner Polar Tankers, Incorporated filed.
Jan 29 2009	CIRCULATED.
Feb 2 2009	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed)
Feb 2 2009	Brief amicus curiae of Tropical Shipping and Construction Company Limited filed. (Distributed)
Feb 2 2009	Brief amici curiae of World Shipping Council, and Cruise Lines International Association filed. (Distributed)
Feb 2 2009	Brief amicus curiae of Council on State Taxation filed. (Distributed)
Feb 2 2009	Brief amicus curiae of Broadband Tax Institute filed. (Distributed)
Feb 17 2009	Record received from the Trial Courts of Alaska. (1 box)
Feb 25 2009	Brief of respondent City of Valdez, Alaska filed. (Distributed)
Mar 2 2009	Record received from the Supreme Court of Alaska. (1 box)
Mar 4 2009	Brief amicus curiae of Multistate Tax Commission filed. (Distributed)
Mar 4 2009	Brief amici curiae of States of Alaska, et al. filed. (Distributed)
Mar 23 2009	Reply of petitioner Polar Tankers, Incorporated filed. (Distributed)
Apr 1 2009	Argued. For petitioner: Charles A. Rothfeld, Washington, D.C. For respondent: Theodore B. Olson, Washington, D.C.

Name	Address	Phone
Attorneys for Petitioner:		
Andrew L. Frey	Mayer, Brown LLP 1675 Broadway New York, NY 10019 afrey@mayerbrown.com	(212) 506-2500
Party name: Polar Tankers, Incorporated		
Attorneys for Respondent:		
Theodore B. Olson Counsel of Record	Gibson Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036 TOlson@gibsondunn.com	(202) 955-8500
Party name: City of Valdez, Alaska		
David C. Frederick	Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C. 1615 M Street, N.W. Suite 400 Washington, DC 20036 dfrederick@khhte.com	(202) 326-7900
Party name: States of Alaska, et al.		
Jonathan F. Mitchell	3301 Fairfax Drive Arlington, VA 60637	(703) 993-8848
Party name: Tropical Shipping and Construction Company Limited		
William M. Walker	Walker & Levesque, LLC 731 N Street Anchorage, AK 99501 bill-wwa@ak.net	(907) 278-7000
Party name: City of Valdez, Alaska		
Other:		
Marc J. Fink	Sher & Blackwell, LLP 1850 M Street, NW Washington, DC 20036	(202) 463-2500
Party name: World Shipping Council & Cruise Lines International Association		

Karen R. Harned	NFIB Small business Legal Center 1201 F Street, N.W. Suite 200 Washington, DC 20004	(202)-314-2061

Party name: National Federation of Independent Small Business Legal Center

Todd A. Lard	Council on State Taxation 122 C Street, NW Suite 330 Washington, DC 20001	(202) 484-5222

Party name: Council on State Taxation

Jerome B. Libin	Sutherland Asbill & Brennan LLP 1275 Pennsylvania Avenue, NW Washington, DC 20004	(202) 383-0100

Party name: Broadband Tax Institute

Shirley K. Sicilian	Multistate Tax Commission 444 North Capitol NW, Suite 425 Washington, DC 20001-1538 ssicilian@mtc.gov	(202) 624-8699

Party name: Multistate Tax Commission

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

08-310 SEP 8 - 2008

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

PETITION FOR A WRIT OF CERTIORARI

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

QUESTIONS PRESENTED

1. Whether a municipal personal property tax that falls exclusively on large vessels using the municipality's harbor violates the Tonnage Clause of the Constitution, art. I, § 10, cl. 3.

2. Whether a municipal personal property tax that is apportioned to reach the value of property with an out-of-State domicile for periods when the property is on the high seas or otherwise outside the taxing jurisdiction of any State violates the Commerce and Due Process Clauses of the Constitution.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a wholly owned subsidiary of ConocoPhillips Co., which in turn is wholly owned by ConocoPhillips.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 7

I. THE TONNAGE CLAUSE PRECLUDES STATE TAXES THAT DISCRIMINATE AGAINST VESSELS MAKING USE OF THE JURISDICTION'S PORTS. 8

II. THE VALDEZ APPORTIONMENT FORMULA THREATENS TO IMPOSE DUPLICATIVE TAXATION AND IMPERMISSIBLY TAXES EXTRATERRITORIAL VALUES 18

CONCLUSION 31

APPENDIX A: Decision of the Supreme Court of Alaska 1a

APPENDIX B: Final Judgment by the Superior Court for the State of Alaska 23a

APPENDIX C: Order by the Superior Court for the State of Alaska 26a

APPENDIX D: Summary Judgment Ruling by the Superior Court for the State of Alaska 31a

TABLE OF CONTENTS—continued

Page

APPENDIX E: Decision and Order by the Superior Court for the State of Alaska.....33a

APPENDIX F: Order Granting Plaintiffs' Motion for Summary Judgment by the Superior Court for the State of Alaska.....36a

APPENDIX G: Valdez Ordinance No. 99-17.....45a

APPENDIX H: Valdez Resolution No. 00-15 .....53a

TABLE OF AUTHORITIES

Page(s)

CASES

Asarco Inc. v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982) 26

Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) 30

Best & Co. v. *Maxwell*, 311 U.S. 454 (1940) 30

Bigelow v. *Dep't of Taxes*, 652 A.2d 985 (Vt. 1994) 17

Braniff Airways v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590 (1954) 25

Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564 (1997) 30

Central Railroad Co. of Pa. v. *Pennsylvania*, 370 U.S. 607 (1962) ..... *passim*

Clyde Mallory Lines v. *Alabama*, 296 U.S. 261 (1935) 9, 10, 11, 15

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 15, 19

Dep't of Revenue v. *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734 (1978) 8, 10

East West Express, Inc. v. *Collins*, 449 S.E.2d 599 (Ga. 1994) 26

Goldberg v. *Sweet*, 488 U.S. 252 (1989) 27

Gulf Caribe Maritime, Inc. v. *Mobile County Revenue Comm'r*, 802 So. 2d 248 (Ala. Ct. Civ. App. 2001) 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Hunt-Wesson, Inc. v. *Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000) 31

Ice Capades, Inc. v. *County of Los Angeles*, 56 Cal. App. 3d 745 (1976) 26

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) ..... *passim*

Japan Line, Ltd. v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977) 7, 16

Jet Fleet Corp. v. *Dallas County Appraisal Dist.*, 773 S.W.2d 744 (Tex. Ct. App. 1988) 26

Johnson Oil Refining Co. v. *Oklahoma*, 290 U.S. 158 (1933) 20

Limbach v. *Hooven & Allison Co.*, 466 U.S. 353 (1984) 13

MeadWestvaco Corp. v. *Ill. Dep't of Revenue*, 128 S. Ct. 1498 (2008) 19, 27

Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976) ..... *passim*

Nashville, Chattanooga & St. Louis Ry. v. *Browning*, 310 U.S. 362 (1940) 29

Norfolk & W. Ry. Co. v. *Mo. State Tax Comm'n*, 390 U.S. 317 (1968) 18, 27, 28

Northwest Airlines, Inc. v. *Minnesota*, 322 U.S. 292 (1944) 22

Ott v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949) ..... *passim*

Plaquemines Port v. *Fed. Maritime Comm'n*, 838 F.2d 536 (D.C. Cir. 1988) 11

TABLE OF AUTHORITIES
(continued)

Page(s)

Pullman's Palace Car Co. v. *Pennsylvania*,
141 U.S. 18 (1891) 19

Quill Corp. v. *North Dakota*,
504 U.S. 298, (1992) 16, 27

State Tonnage Tax Cases,
79 U.S. 204 (1870) 10, 14, 16

Thomas Truck Lease, Inc. v. *Lee County ex rel. Mitchell*, 768 So. 2d 870 (Miss. 1999) 26

Transportation Co. v. *Wheeling*,
99 U.S. 273 (1878) ..... *passim*

Trinova Corp. v. *Mich. Dep't of Treas.*,
498 U.S. 358 (1991) 8, 29, 31

West Lynn Creamery, Inc. v. *Healy*,
512 U.S. 186 (1994) 13, 30

CONSTITUTION AND STATUTES

Commerce Clause,
U.S. Const. art I, § 8, cl.3 ..... *passim*

Import-Export Clause,
U.S. Const. art. I, § 10, cl. 2 ..... *passim*

Tonnage Clause,
U.S. Const. art. I, § 10, cl. 3 ..... *passim*

Due Process Clause,
U.S. Const. amend. XIV ..... *passim*

28 U.S.C. § 1257 1

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

3 M. Farrand, *The Records of the Federal Convention of 1787* (1911) 9, 10

J. Madison, *Preface to Debates in the Convention of 1787*, in 3 M. Farrand, *The Records of the Federal Convention of 1787* (1911) 9

Valdez City Code
§ 3.12.020(A)(1) 3
§ 3.12.020(C)(1) 3

Valdez Ordinance No. 99-17 3

Valdez Resolution No. 00-15 ..... 3, 13, 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner Polar Tankers, Inc., respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alaska in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alaska (App., *infra*, 1a-22a), is reported at 182 P.3d 614. The opinions of the Superior Court for the State of Alaska (App., *infra*, 23a-44a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on April 25, 2008. On July 22, 2008, Justice Kennedy extended the time for filing a petition for a writ of certiorari until September 8, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Tonnage Clause of the United States Constitution, art. I, § 10, cl. 3, provides, in relevant part:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage * * *.

The Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, provides, in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

The Due Process of the Fourteenth Amendment to the United States Constitution provides:

> Nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

This case involves three provisions of the Constitution that limit the taxing authority of state and local governments. One is the Tonnage Clause, art. I, § 10, cl. 3, which proscribes the imposition by state or local governments of taxes that effectively fall on the privilege of using ports and harbors. The others are the Commerce Clause, art. I, § 8, cl. 3, and the Fourteenth Amendment's Due Process Clause, both of which preclude non-domiciliary state and local governments from taxing extraterritorial values.

The City of Valdez, Alaska, has enacted a tax that runs afoul of all three of these constitutional proscriptions. It is a discriminatory personal property tax that falls *only* on certain large vessels and that has the avowed purpose of raising revenue from vessels that dock in the City; this is precisely the sort of levy that this Court that has described as running afoul of the Tonnage Clause. And Valdez compounded its constitutional error by apportioning the tax in such a way as to claim a right to tax vessels domiciled elsewhere for a portion of the time that those vessels spend on the high seas (or otherwise away from any tax situs); this both threatens to impose duplicative taxation on the vessels and projects the City's taxing authority beyond its constitutional bounds. Because the ruling of the Alaska Supreme Court upholding the Valdez tax rests on a plain misunderstanding of this Court's decisions, improperly expands local taxing authority at the expense of out-of-state interests and interstate commerce, and de-

nies petitioners protections safeguarded by the U.S. Constitution, further review is warranted.

1. Prior to 2000, Valdez exempted all personal property from property tax. Effective that year, the City repealed the personal property tax exemption for one, and only one, type of property: "boats and vessels of at least 95 feet in length" that are not used "primarily in some aspect of commercial fishing" and that dock at privately owned docks in the City. Valdez Ordinance No. 99-17 (codified at Valdez City Code § 3.12.020(A)(1)) (App., *infra*, 45a). As a practical matter, the Valdez personal property tax falls almost exclusively on oil tankers and vessels that escort or assist oil tankers in Prince William Sound. R. Exc. 273-274, 814-817, 827. This was not an accident: imposition of the personal property tax on such vessels "climaxed a long-term effort by the City to address a serious financial dilemma" caused by depreciation of "oil and gas property" that formed a "significant portion of the available tax base located in the City." App., *infra*, 38a.

Valdez applies the personal property tax to vessels that have acquired a tax situs in the City. Valdez City Code § 3.12.020(C)(1) (App., *infra*, 46a). When a vessel also has a tax situs elsewhere for a portion of the year (as do all vessels subject to the tax that dock in Valdez, including those of petitioner), the Valdez tax is apportioned between Valdez and the other taxing jurisdictions. The apportionment formula applied by Valdez calculates the value subject to tax in the City by multiplying the total assessed value of the vessel by "a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation." Valdez Resolution No. 00-15 (App., *infra*,

55a) (emphasis added). This approach *excludes* from the denominator of the apportionment formula all time spent by a vessel on the high seas or otherwise outside the jurisdiction of a tax situs. Thus, as the Alaska Supreme Court described the tax, "if we assume that a vessel is in port in Valdez for fifty days a year and in port in all jurisdictions including Valdez for 150 days per year, the Valdez apportionment ratio would be 50/150." App., *infra*, 13a. Because oil tankers invariably spend a significant portion of the year on the high seas, the Valdez formula increases the portion of the vessel's value that is subject to taxation by the City, effectively taxing the vessels while they are on the high seas.

2. Petitioner is a corporation that is organized under the laws of Delaware and that, during the tax years at issue here, had its principal place of business in Long Beach, California; its principal office is now in Houston, Texas. Petitioner's primary business is operating tankers that transport crude oil from a terminal in Valdez to refineries in California, Hawaii, and Washington. Typically, a tanker leaves a port in one of those States and travels across international waters for approximately three to six days on its way to Valdez. It then spends approximately fourteen to twenty-four hours in Valdez to load cargo, followed by three to six days in international waters in transit to a discharge port, and thirty-six to seventy-two hours in that port. After discharging its cargo, the tanker begins the cycle again. Approximately every other year the tanker will be removed from service for a substantial period of time to enter drydock for maintenance and repairs. Such maintenance is not conducted in Valdez. R. Exc. 74, 189-190.

Petitioner challenged the constitutionality of the levy in Alaska state court on two grounds: (1) that the Valdez tax violates the Tonnage Clause because it effectively taxes vessels for the privilege of using the City's harbor; and (2) that the City's apportionment methodology violates the Commerce and Due Process Clauses both by subjecting vessels to the risk of duplicative taxation and by taxing extraterritorial values. In its initial opinion, the trial court held the tax unconstitutional under the Tonnage Clause. It reasoned that "[l]arge vessels, and only large vessels, are the only personal property taxed by the City. In little sense then can it be considered a property tax of general application falling on oil tankers along with other types of property. This is a tonnage duty." App., *infra*, 43a. On reconsideration, however, the trial court changed its view and rejected the Tonnage Clause challenge. Although it continued to recognize that "the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (*id.* at 29a), and is not "generally applicable" (*id.* at 30a, the court concluded that "[t]he failure of the City to tax more property does not make its taxation of all property of this class an unconstitutional tonnage tax." *Ibid.*

On the other hand, the trial court held that the City's apportionment method violates the Commerce and Due Process Clauses. App., *infra*, 33a-35a. That is because "the tax creates a risk of multiple taxation by both domiciliary and non-domiciliary states." *Id.* at 34a. In the court's view, the State of a vessel's domicile retains the right to include in the measure of any property tax it imposes the value of the property for all the time that the vessel is on the high seas and has no specific tax situs, rendering the "denominator [of the Valdez apportionment formula]

problematic because it ignores the possibility that a domiciliary state may tax a ship while it is in international waters." *Id.* at 34a-35a. Using the example of one of petitioner's co-plaintiffs, the court concluded: "SeaRiver's ships are domiciled in Texas; thus, Texas may enact a property tax on SeaRiver's ships while they are in international waters. Since Valdez is already taxing those ships for part of the time they actually spend in international waters, there is risk of multiple taxation." *Ibid.* The court accordingly held that Valdez could impose its tax only if it made use of an acceptable apportionment formula. *Id.* at 23a-24a.

3. The Alaska Supreme Court upheld the Valdez tax entirely, rejecting both the Tonnage Clause and the apportionment challenge. App., *infra*, 1a-22a. Addressing apportionment first, the court recognized that "[a] tax may be invalid even if it creates only a risk of duplicative taxation." *Id.* at 11a. But the court found the Valdez apportionment formula proper because it "apportions the full value of a ship between the taxing jurisdictions in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. * * * There is no reason why the days at sea outside the jurisdiction of any taxing authority should be included in the denominator of the fraction." *Id.* at 12a-13a.

The court specifically rejected the possibility of duplicative taxation in this context, on the ground that the domicile of a vessel's owner (now, in the case of petitioner, Texas) may *not* "extraterritorially tax its vessels for all time spent on the open seas." App., *infra*, 13a n.26. In the Alaska Supreme Court's view, this Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), had "repudiat[ed]"

the nineteenth century "home port" doctrine, which had held that *only* the home port of a vessel could subject it to property tax, even if the vessel were habitually used in another jurisdiction. App., *infra*, 13a n.26. That repudiation of the home port doctrine, the Alaska court believed, also precluded the taxation of personal property by the owner's domicile for the period when the property had no specific tax situs. *Ibid.*

The Alaska Supreme Court also held the Valdez tax consistent with the Tonnage Clause, reasoning that "a fairly apportioned ad valorem tax on personal property * * * necessarily * * * does not violate the Tonnage Clause." App., *infra*, 18a. Relying on the California Supreme Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), rev'd on other grounds, 441 U.S. 434 (1979), the Alaska court found it immaterial that the Valdez tax is "imposed only on specific vessels." App., *infra*, 20a. In the court's view, it is sufficient to satisfy the Tonnage Clause that the challenged levy is "based on the value of property." *Id.* at 20a, 21a.

REASONS FOR GRANTING THE PETITION

The Alaska Supreme Court's decision is manifestly inconsistent with this Court's precedents on two issues that are important to carriers engaged in international maritime transport. This Court has made clear that a state property tax that discriminates against vessels making use of local ports is barred by the Tonnage Clause, yet that is precisely what the Valdez tax does, and indeed was *designed* to do. At the same time, the City's assertion of taxing authority over personal property domiciled in another state for a portion of the time when the property has *no* specific tax situs – as well as the Alaska

court's insistence that the state where the property *is* domiciled *lacks* that taxing authority – rests on propositions that have been rejected by this Court.

A state court's departure from this Court's application of the Constitution would be a serious matter in any setting. And that sort of error is especially troubling when, as here, the state court has allowed a local jurisdiction to export tens of millions of dollars of its tax burden to outsiders in a manner that threatens to foment "interstate rivalry and friction." *Dep't of Revenue* v. *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 754 (1978). In such circumstances, this Court has acknowledged the importance of enforcing the constitutional directives that "act as a defense against state taxes which, whether by design or inadvertence, either give rise to serious concerns of double taxation, or attempt to capture tax revenues that, under the theory of the tax, belong of right to other jurisdictions." *Trinova Corp.* v. *Mich. Dep't of Treas.*, 498 U.S. 358, 386 (1991). Because the decision below misapplies the Constitution and misunderstands the controlling decisions of this Court, it should be reviewed and set aside.

I. THE TONNAGE CLAUSE PRECLUDES STATE TAXES THAT DISCRIMINATE AGAINST VESSELS MAKING USE OF THE TAXING JURISDICTION'S PORTS.

1. There should be little doubt that the Valdez tax is inconsistent with the Tonnage Clause, which provides: "No State shall, without the Consent of Congress, lay any Duty of Tonnage * * * ." U.S. Const. art. I, § 10, cl. 3. Although questions about the meaning of the Clause have been litigated comparatively infrequently, the general contours of the limits it imposes on state authority are well estab-

lished. The provision was inserted into the Constitution

> to supplement Art. I, § 10, Clause 2 [the Import-Export Clause], denying to the states the power to lay duties on imports or exports * * * by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state * * * . If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.

Clyde Mallory Lines v. *Alabama*, 296 U.S. 261, 264-265 (1935).

As the Court has explained, the purpose of these provisions is made clear by the constitutional debates. Insofar as is relevant here, the Court, quoting James Madison, noted that a "'source of dissatisfaction [under the Articles of Confederation] was the peculiar situation of some of the States, which having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on.'" This "'never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old.'" *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283-284 (1976) (quoting Madison's *Preface to Debates in the Convention of 1787*, in 3 M. Farrand, *The Records of the Federal Convention of 1787*, at 542 (1911)). See *id.* at 285 ("'the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them'") (quoting Farrand, *supra*, at 548). "The Framers of the Constitution thus sought to alleviate [these] concerns" and to preserve "harmony

among the States" by prohibiting "seaboard States, with their crucial ports of entry, * * * from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Ibid.*[1] The Import-Export Clause, and its Tonnage Clause corollary, accordingly were "fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State" (*id.* at 290), so as "to prevent coastal States from abusing their geographical positions" and thus "to prevent interstate rivalry and friction." *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. at 753, 754.

To effectuate this purpose, the Court has understood the Tonnage Clause to prohibit "levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state." *Clyde Mallory Lines*, 296 U.S. at 265. This restriction proscribes not only state and local taxes that literally fall upon the tonnage of a vessel (see, *e.g.*, *State Tonnage Tax Cases*, 79 U.S. 204, 214-215 (1870)) or that expressly purport to be on the "privilege" of port access, but also "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines*, 296 U.S. at 265-266.

Under this rule, States *may* impose fees or charges for services provided to vessels, "such as pilotage, towage, charges for loading and unloading

---

[1] Although the Court in *Michelin Tire* was addressing imports, the same policies apply to exports. See *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. at 758 ("any tax relating to exports can be tested for its conformance" with the policies identified in *Michelin Tire*).

cargoes, wharfage, storage and the like." *Id.* at 265. See *id.* at 266 (prohibition "does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage * * *, or wharfage * * *, or charges for the use of locks on a navigable river * * *, or fees for medical inspection"); *Plaquemines Port* v. *Fed. Maritime Comm'n*, 838 F.2d 536, 545 (D.C. Cir. 1988) (same). And States may charge not only for specific services provided to individual vessels, but also for the "general service" of "securing the benefits and protection of the rules to shipping in the harbor" (*Clyde Mallory Lines*, 296 U.S. at 264, 266); for this purpose, vessels may be subject to personal property tax "based on a valuation of the [vessel] as property." *Transportation Co.* v. *Wheeling*, 99 U.S. 273, 279 (1878). But of particular importance here, "the prohibition" of the Tonnage Clause *does* "come[] into play where [the vessels] *are not taxed in the same manner as the other property of the citizens.*" *Id.* at 284 (emphasis added).

This prohibition of discriminatory property taxes on vessels is an essential element of the rule. If property taxes that fall only on vessels making use of the jurisdiction's docks are permissible, it would be an easy matter for States to disguise what really are "tax[es] [on] the privilege of access by vessels to their harbors" (*Clyde Mallory Lines*, 296 U.S. at 264-265) simply by tweaking the label applied to the charge – thus frustrating the policy of both the Tonnage and the Import-Export Clauses. Presumably for that reason, the Court has given considerable emphasis to the requirement that property taxes in this context be nondiscriminatory, repeating that requirement

five times in *Wheeling* and at least 13 times in *Michelin Tire*.[2]

In fact, in *Michelin Tire* the Court specifically noted, in reference both to ad valorem property taxes and to other types of levies imposed on imported goods after their entry into the United States:

> Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though operating after an "initial sale" of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost.

423 U.S. at 288 n.7.

While the Court has not had occasion to address the Tonnage Clause in recent years, its Tonnage Clause decisions generally accord with its modern approach in analogous areas, such as the Commerce and Import-Export Clauses. Indeed, the Court's emphasis on the nondiscrimination principle under the Tonnage Clause anticipates modern constitutional

---

[2] See *Wheeling*, 99 U.S. at 282 (a state "may tax a ship or other vessel used in commerce the same as other property owned by its citizens"); *ibid.* ("the owners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property"); *id.* at 283 (vessels "may be taxed like other property"); *id.* at 284 ("the prohibition only comes into play where [vessels] are not taxed in the same manner as the other property of the citizens"); *ibid.* ("the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal property"); *Michelin*, 423 U.S. at 279-302.

tax doctrine in significant respects. When addressing related constitutional limits on state taxing authority under the Commerce Clause, the Court has come to reject formalistic rules and has emphasized the practical impact of the challenged levies on the taxpayer, while also recognizing that interstate businesses must pay their own way – so long as they are not subjected to discriminatory treatment. See, *e.g.*, *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201-202 (1994). And under the Import-Export Clause, the provision of the Constitution that is directly complemented by the Tonnage Clause, the Court's most recent holdings have disavowed old rules based on the formal nature of goods subject to taxation as imports and held instead that "prohibition of *nondiscriminatory* ad valorem property taxation [on imported goods] would not further the objectives of the Import-Export Clause." *Michelin Tire*, 423 U.S. at 293 (emphasis added). See *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 360 (1984) ("*Michelin* changed the focus of Import-Export Clause cases from the nature of the goods as imports to the nature of the tax at issue").

2. The Valdez levy is flatly inconsistent with the Tonnage Clause nondiscrimination requirement because it does not tax vessels "in the same manner as the other property of the citizens." *Wheeling*, 99 U.S. at 284. To the contrary, "large vessels, and only large vessels, are the only personal property taxed by the City" (App., *infra*, 43a), and the tax was then further gerrymandered to exclude vessels used primarily in commercial fishing, most of which are local. In fact, the tax plainly seems to have been drafted to apply only to ocean-going tankers, a point that both courts below recognized in acknowledging that the tax was adopted in response to "a serious erosion of

the city's tax base, much of which is oil- and gas-related property." *Id.* at 3a; see *id.* at 38a; see also Valdez Resolution No. 00-15 (App. *infra*, 54a) ("funds received from an ad valorem tax on vessels over 95 feet in length [are] intended to offset the fiscal instability resulting from the continued decline in the Valdez tax base and to be able to obtain fiscal stability").

Moreover, the tax was not designed to charge for services uniquely provided to tankers; the trial court "found that the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (App., *infra*, 29a), and the Valdez City Council made explicit that the tax would "allow for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities." Valdez Resolution No. 00-15 (App., *infra*, 54a); see also App., *infra*, 19a-20a. The tax accordingly is a close Tonnage Clause equivalent of the hypothetical discriminatory tax on imports that the Court in *Michelin Tire* declared impermissible under the Import-Export Clause. The levy purports to be a property tax rather than a tonnage duty, but the reality is that it is uniquely imposed on vessels that dock in Valdez. The property tax label, and the availability of municipal services to vessels that dock in Valdez, should not save such a tax.[3]

---

[3] It does not matter that the Valdez tax does not, in terms, purport to be on the "privilege" of docking in the City. Under the Commerce Clause, the Court has refused to "attach[] constitutional significance to [such] a semantic difference,'" instead "emphasiz[ing] the importance of looking past 'the formal language of the tax statute [to] its practical affect.'" *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 285, 279 (1977)).

The Alaska Supreme Court's rationales for upholding the Valdez tax in the face of its discriminatory impact are all patently unpersuasive. *First*, the court opined, in reliance on the *State Tonnage Cases*, that "[a] fairly apportioned property tax is not a tonnage duty"; "[h]aving concluded that the disputed vessel tax is a fairly apportioned ad valorem tax on personal property, we necessarily also hold that it does not violate the Tonnage Clause." App., *infra*, 18a. But that holding misreads this Court's understanding of the provision. The *State Tonnage Cases* held that tonnage fees are *not* permissible property taxes, and therefore cannot be saved by the rule validating property taxes generally. 79 U.S. at 217. *Wheeling* subsequently confirmed that property taxes on vessels may satisfy the Clause, but only when the vessels are "taxed in the same manner as the other property of the citizens." 99 U.S. at 284. The Alaska Supreme Court simply ignored that indispensable part of the rule.

Second, responding to the argument that the Valdez tax is discriminatory, the Alaska court concluded that "the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property," citing *state* law that authorizes municipalities to exempt some types of personal property from ad valorem property taxes. App., *infra*, 20a. But this observation is beside the point. *Wheeling* and *Michelin Tire* indicate that the *U.S. Constitution* prohibits the imposition of discriminatory property taxes on vessels. State law cannot authorize a violation of the federal constitutional requirement.

Third, addressing *Wheeling*'s "in the same manner" language, the Alaska court read *Wheeling* to stand for "the proposition that a charge based on the

value of property is not a duty of tonnage." App., *infra*, 20a. That analysis is simply wrong; as we have noted, this Court has made clear that the Tonnage Clause proscribes "*all* taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines*, 296 U.S. at 265-266 (emphasis added). The court below also sought to explain away the language of *Wheeling* by opining that "Valdez taxes the vessels' value using the same mill rate it uses for all other property, including real property. It thus taxes the vessels in the same manner as other property, because the tax is based on value." App., *infra*, at 20a (footnote omitted). But this rationale is wrong, too. *Wheeling* indicated that *nondiscriminatory* property taxes are not duties of tonnage, carefully hedging its holding with the caveat that the tax must be levied "upon a valuation as in respect to *all other personal property*." 99 U.S. at 284 (emphasis added). The relevant question therefore goes not to the tax rate, but to the range of property subject to tax. And in Valdez, all personal property other than the disfavored vessels is either not subject to or exempt from personal property tax.

Fourth, the authority relied upon by the Alaska Supreme Court to justify the Valdez tax does not support its holding. The court (at App., *infra*, 19a) principally invoked the California Supreme Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), which rejected a Tonnage Clause challenge to "nondiscriminatory ad valorem property taxes." *Id.* at 258. But even setting aside the fact that the California court's decision in *Japan Line* was *reversed* on Commerce Clause

grounds by this Court – which expressly declined to reach the Tonnage Clause question in light of that disposition (see 441 U.S. at 439 n.3) – the reasoning of the California Supreme Court does not support the decision below. In *Japan Line*, the tax at issue was a *nondiscriminatory* general tax, not directed at shipping containers in particular. See *Japan Line*, 441 U.S. at 437. See also *id.* at 445 (California levy was "an ad valorem tax of general application"). The decision therefore simply did not address the consideration that is crucial in this case: that the challenged tax singles out oceangoing vessels for unfavorable treatment.[4]

3. A state-court decision that so far departs both from this Court's guidance and from constitutional principle warrants further review. The holding of the Alaska Supreme Court allows a State or municipality to single out ocean-going vessels for special charges, thus effectively "taxing goods merely flowing through their port[] to the other States not situated as favorably geographically" (*Michelin*, 423 U.S. at 285-286) and levying a tax that "could only be imposed because of the peculiar geographical situation of [the City] that enable[s] [it] to single out goods destined for other States." *Id.* at 290. The tax thus plainly is intended to export the local tax burden to out-of-state entities. And the Alaska Supreme Court's decision upholding the tax disregards clear direction from this Court, which has emphasized in several related contexts that such property taxes

---

[4] The same distinction applies to the tax upheld by the Vermont Supreme Court in *Bigelow* v. *Dep't of Taxes*, 652 A.2d 985, 987-988 (Vt. 1994), which also was invoked by the Alaska court (at App., *infra*, 18a n.43).

must be nondiscriminatory. Further review accordingly is in order.

II. THE VALDEZ APPORTIONMENT FORMULA THREATENS TO IMPOSE DUPLICATIVE TAXATION AND IMPERMISSIBLY TAXES EXTRATERRITORIAL VALUES.

Even if the Valdez tax could survive scrutiny under the Tonnage Clause, it remains constitutionally flawed because the City apportions the levy in a manner that violates the Commerce and Due Process Clauses. Under the City's apportionment methodology, the fraction of total value of the property subject to tax that is allocated to Valdez reflects the number of days a ship spends in Valdez as compared to the number of days it spends in any port that is a tax situs. The formula accordingly omits from the denominator all time that a vessel is *not* in a tax situs. The upshot of this formulation is that Valdez effectively is claiming the right to tax vessels that dock in the City for a portion of the time that they spend on the high seas (or in ports that do not qualify as a tax situs), even though the vessels are not domiciled in Alaska.

This claim cannot be squared with the Constitution in two respects. It risks imposing duplicative taxation on vessels because they *are* subject to being taxed *in full* by their States of domicile for time spent outside a tax situs. And it asserts taxing authority over property that is located outside Alaska's jurisdiction.

1. "Established principles are not lacking in this much discussed area of the law." *Norfolk & W. Ry. Co.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968). On the one hand, "[i]t is of course settled that a State may impose a property tax upon its fair

share of an interstate transportation enterprise." *Ibid.* On the other, "the Court has insisted for many years that a State is not entitled to tax tangible or intangible property that is unconnected with the State," and it has held that States may not "cast their tax burden upon property located beyond their borders." *Id.* at 324, 325.

To accommodate these rules, under both the Commerce and the Due Process Clauses the values subject to a state or local tax, including a property tax, must be apportioned among all jurisdictions in which the property has acquired tax situs, which is defined for property tax purposes as existing when there has been "habitual employment [of the property] within the jurisdiction." *Central Railroad Co. of Pa.* v. *Pennsylvania*, 370 U.S. 607, 613 (1962).[5] Although this requirement was developed in cases involving railroad rolling stock, it has been applied to virtually all movable property, including vessels. See, *e.g.*, *Japan Line*, 441 U.S. at 442; *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949); *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891).[6] And it is settled that property that has

---

[5] The Court applies a four-part test under the Commerce Clause: a state tax must (1) be applied to an activity with a substantial nexus to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided to the taxpayer by the state. See *Complete Auto*, 430 U.S. at 279. Insofar as is relevant in this case, however, the requirements of the Commerce and Due Process Clauses substantially overlap. See generally *Mead-Westvaco Corp.* v. *Illinois Dept. of Revenue*, 128 S. Ct. 1498, 1505 (2008).

[6] The one exception has been oceangoing vessels; the Court has never expressly repudiated the home port doctrine as it applies to such vessels, and therefore has not squarely held that such vessels may be taxed by any jurisdiction other than their State

not acquired *any* tax situs elsewhere may be taxed at its full value by the domicile of the owner, even if the property spends a portion of the tax year outside the domicile's jurisdiction. See *Central Railroad*, 370 U.S. at 612; *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U.S. 158, 161 (1933).

The question here is how these rules apply to the apportionment of taxes on property that may be taxed by more than one jurisdiction but has no identifiable tax situs for a portion of the year. Specifically, it is whether the domicile State has the right to tax *all* the value for periods when there is no established tax situs (as we maintain), or whether nondomicile jurisdictions that have acquired tax situs regarding the property for a portion of the year also may tax a portion of the value attributable to periods when the property had no situs (as Valdez asserts and the Alaska Supreme Court held).

That is a question this Court has answered. In *Central Railroad*, the Court held that the Due Process and Commerce Clauses do *not* "confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's border." 370 U.S. at 612. Instead, the domiciliary State is empowered to tax the full

---

of domicile. See *Japan Line*, 441 U.S. at 442 ("In discarding the 'home port' theory for the theory of apportionment, * * * the Court consistently has distinguished the case of oceangoing vessels"); *id.* at 443-444 ("There is no need in this case to decide currently the broad proposition whether mere use of international ports is enough, under the 'home port doctrine,' to render an instrumentality immune from tax in a nondomiciliary State."). In this case, however, petitioner did not contend below that the home port doctrine applies and so does not raise that issue here.

property value *except* to the extent that the taxpayer "prove[s] that the same property may be similarly taxed in another jurisdiction." *Id.* at 613. The Court therefore held that a non-domicile State gets to tax the proportion of the property's value that corresponds to the proportion of the year spent by the property in that jurisdiction, and the domicile state gets to tax the rest.

The problem was presented in *Central Railroad* from a different angle than that here: in *Central Railroad*, the State of *domicile* (Pennsylvania) asserted that it had authority to tax the *entire* value of the property at issue (a fleet of rail cars); here, a *non-domicile* jurisdiction asserts that it is entitled to tax a portion of the value for which the property has no tax situs. Nevertheless, the same principles govern both situations. The *Central Railroad* Court carefully defined the scope of the domicile State's authority in a case where another jurisdiction also had acquired tax situs regarding the property for a portion of the year. The Court held that the value of the rail cars "could not constitutionally be included in the computation of th[e] Pennsylvania tax" for the period when they were actually subject to another state's tax jurisdiction (*id.* at 614), but that "Pennsylvania was constitutionally permitted to tax, at full value, the remainder of [the taxpayer's] fleet of freight cars," including cars that spent time moving "outside the domiciliary State." *Id.* at 614, 616. The Court's holding therefore was that non-domicile jurisdictions are entitled to tax property in proportion to the portion of the year that the property spent in that jurisdiction, while the State of domicile gets to tax the value of the property for all other periods.

This conclusion follows from the Court's historic treatment of the authority of the property owner's

domicile. The Court has held that property that has no tax situs for a portion of the year should not "escape [property] taxation entirely" for that period. *Central Railroad*, 370 U.S. at 617. This means that taxing authority over such siteless property must either be (1) allocated to the domicile or (2) apportioned proportionately between the domicile and those non-domicile jurisdictions that have acquired tax situs for a portion of the year. As between these two choices, the former is compelled by this Court's decisions. Allowing the domicile to tax for that period accords with the traditional and, so far as we are aware, unchallenged authority of the domicile to tax at full value property that has not acquired *any* actual situs elsewhere. It is an authority premised on the understanding that the domicile provides the property owner unique "'opportunities, benefits, or protection.'" *Id.* at 612 (citation omitted). See *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 297-298 (1944). It follows from that same understanding that the State of domicile possesses authority to tax the *portion* of the property's value that is attributable to time spent outside any tax situs.

2. Against this background, the Alaska Supreme Court's decision embodies two fundamental errors. First, it subjects the vessels taxed by Valdez to the danger of duplicative taxation. As the court below correctly acknowledged, duplicative taxation is unconstitutional and "[a] tax may be invalid even if it creates only a risk of duplicative taxation." App., *infra*, 11a (citing *Central Railroad*, 370 U.S. at 614). Here, as the Alaska court also noted, "[a] risk of multiple taxation" would exist "if * * * [petitioner's] domicile can extraterritorially tax its vessels for all time spent on the open seas." *Id.* at 13a n.26. And for the reasons explained above, the doctrine of

Central Railroad means that the domicile State may indeed tax its vessels for all time spent on the high seas and away from any port. If that is so, the Valdez tax creates potential for impermissible duplicative taxation as both Valdez and the domicile State seek to tax the value of the vessels for time spent on the high seas.[7]

In ruling to the contrary, the Alaska Supreme Court rejected the idea that the domicile may tax vessels for all time spent on the high seas. It believed that the domicile's historic authority to tax property for periods when it is not physically present in the jurisdiction is traceable to the home port doctrine. But it concluded that "the Supreme Court in *Japan Line* * * * recognized the home port doctrine has yielded to a rule of fair apportionment among situs states." App., *infra*, 11a-12a (citing *Japan Line*, 441 U.S. at 442). The Alaska court added that "[m]odern precedent and the repudiation of the home port doctrine in *Japan Line*, 441 U.S. at 443, suggest that a domicile possesses no such expansive powers" – *i.e.*, no more power than any other tax situs jurisdiction – to tax vessels for time spent on the high seas. *Id.* at 13a n.26. The court therefore found that petitioner's "view of a domicile's ability to assert an extraterritorial tax conflicts with the tenor of *Japan Line*." *Ibid.* And if that is so, the court concluded, there is no danger of unconstitutional duplicative taxation here.

---

[7] We note that the rule of *Central Railroad* – that only the domiciliary state may apportion to itself time spent on the high seas – would not necessarily lead to lower taxes for the vessel owner. That would depend on whether the domiciliary state (1) taxed based on all operations for which there was no other tax situs and (2) had a higher or lower tax rate than the average of other tax situs states.

The Alaska Supreme Court's ruling, then, turns on the ideas that (1) the domicile's special taxing authority derives from the home port doctrine, and (2) *Japan Line* worked a sea change in Commerce Clause analysis by not only repudiating the home port doctrine but also by retiring entirely the domicile preference. See App., *infra*, 13a n.26. But that analysis is wrong on both points and reflects a plain misreading of this Court's decisions. As the Court explained in *Japan Line*, the home port doctrine was a variant of the ancient rule that treated personal property as "being taxable in full at the domicile of the owner" even if that property were used in another jurisdiction for a substantial portion of the year. 441 U.S. at 442. As the Court also noted, it had repudiated the application of that approach to most forms of "moving equipment" long before *Japan Line*, replacing it with the "rule of fair apportionment among the States." *Ibid.* But that does not mean that the State of domicile is stripped of all special taxing powers. To the contrary, these decisions left the Court free to rule, as it did in *Central Railroad*, that while the State of domicile must yield to the taxing powers of other States to the extent property is used in those States, it may tax all values that are not subject to tax in another jurisdiction. See, *e.g.*, 370 U.S. at 612 (citing *Ott*, 336 U.S. at 174).

Nothing in *Japan Line* calls into question any aspect of that rule. The case actually was about something very different – whether the same standards that apply to apportionment for *interstate* commerce should apply to *foreign* commerce. The Court concluded in *Japan Line* that it should not "rehabilitate the 'home port doctrine'" to deal with the special issues presented by foreign commerce

(see 441 U.S. at 443), but its solution was not to diminish the taxing power of the domiciliary jurisdiction over either foreign *or* domestic commerce. Instead, *Japan Line rejected* attempts by California to assert *any* taxing authority over the property in question because the property's domicile, Japan, taxed its full value. *Id.* at 451. California in that case occupied the position of Valdez in this one. It therefore would be perverse to read the decision as announcing a new constitutional doctrine eliminating the residual rights of domiciliary States. The Alaska Supreme Court's decision, which read *Japan Line* to do just that, is not supportable: the State of domicile *may* impose a tax on vessels that reaches value also taxed by Valdez, and this danger of duplicative taxation renders the Valdez tax unconstitutional.[8]

Indeed, in cases both before and after *Japan Line*, state courts have held that the State of domicile may tax the full value of property except to the extent that it has acquired a taxable situs elsewhere. Although not addressing the precise question presented here, these decisions are substantially at odds with the Alaska Supreme Court's analysis. See *Gulf Caribe Maritime, Inc.* v. *Mobile County Revenue Comm'r*, 802 So. 2d 248 (Ala. Ct. Civ. App. 2001)

---

[8] The Alaska court also purported to find support for its holding in *Braniff Airways* v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590 (1954), and *Ott*. See App., *infra*, 13a-15a. But *Braniff* simply did not address the reasonableness of the apportionment formula used by the State in that case, which was not challenged by the taxpayer. See 347 U.S. at 598. It therefore has no direct bearing here. And *Ott* says nothing at all to support the Alaska court's speculation that the decision meant to approve a non-domicile State's right to tax property for a portion of the time spent on the high seas.

(applying *Central Railroad* to conclude that a domicile State may levy its full tax if no other tax situs can be identified); *East West Express, Inc.* v. *Collins*, 449 S.E.2d 599, 600 (Ga. 1994) ("the U.S. Supreme Court has ruled that the Due Process and Commerce Clauses of the United States Constitution require that ad valorem tax on property engaged in interstate commerce must be apportioned if the taxpayer bears its burden of demonstrating that its property has acquired a tax situs in another state"); *Jet Fleet Corp.* v. *Dallas County Appraisal Dist.*, 773 S.W.2d 744, 746 (Tex. Ct. App. 1988) ("As a matter of due process, the state of domicile has jurisdiction to tax the personal property of its corporations unless some measurable portion of the property has acquired a permanent location or 'taxable situs' elsewhere."); *Ice Capades, Inc.* v. *County of Los Angeles*, 56 Cal. App. 3d 745, 755 (1976) (holding that, for property domiciled in California, having a taxable situs in New Jersey, and touring through a variety of other states without acquiring a taxable situs, "a formula will be valid if it apportions to the County of Los Angeles, as the domicile of Ice Capades, the proportion of the value of the property which the period of the tax year during which the property was not present in New Jersey bears to 365 days"); see also *Thomas Truck Lease, Inc.* v. *Lee County ex rel. Mitchell*, 768 So. 2d 870, 874 (Miss. 1999) (holding – apparently in error – that a domicile state may levy an *unallocated* ad valorem property tax), cert. denied, 531 U.S. 812 (2000).

3. In addition, and wholly apart from the possibility of duplicative taxation, the apportionment formula used by Valdez is improper because it allows the City to tax values that have no connection to Valdez. It is fundamental that "[t]he Due Process

and Commerce Clauses forbid the States to tax 'extraterritorial values.'" *MeadWestvaco*, 128 S. Ct. at 1502; accord *Asarco Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982). A State may tax "only its fair share of an interstate transaction" (*Goldberg* v. *Sweet*, 488 U.S. 252, 261 (1989)), which, in the context of a property tax, is defined as "the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing State." *Norfolk & W. Ry.*, 390 U.S. at 323. The "question is whether the tax in practical operation has relation to opportunities, benefits, or protection conferred or afforded by the taxing State. * * * Those requirements are satisfied if the tax is fairly apportioned to the commerce carried on in the State." *Ott*, 336 U.S. at 174. See *Quill*, 504 U.S. at 306 (citation omitted) ("income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State'").

Here, the Valdez tax is not fairly apportioned to the commerce carried on in the City and has no practical connection to the benefits the City provides the taxpayer. The Court has held, in decisions like *Central Railroad*, that a State may apportion movable property for tax purposes by taxing the percentage of the property's value that corresponds to the portion of the year that the property spends in the taxing jurisdiction. Under that rule, the percentage of time that a vessel spends in Valdez should be measured by dividing the number of days spent in Valdez by the total number of days in the year. But that is not what the City does. Instead of computing the percentage of time that a vessel spends in Valdez, the City computes the relative proportion of days spent by a vessel within Valdez's jurisdiction and days spent *in any port*. Thus, days spent outside the ju-

risdiction of Valdez but also spent outside any other jurisdiction are excluded from the denominator. Decreasing the denominator, of course, has the necessary effect of increasing Valdez's property base and, by definition, leads Valdez to tax the property for time that it is outside the City's jurisdiction. Because Alaska is not the State of domicile, this formula has no "relation to opportunities, benefits, or protection conferred or afforded by the taxing State." *Ott*, 336 U.S. at 174.

Consider the most extreme case – a vessel domiciled in California that spends one day out of the year docked in Long Beach, one day docked in Valdez, and the other 363 days of the year on the high seas. Valdez asserts the right to tax half the value of that vessel. It is apparent that, even apart from the danger of duplicative taxation, Valdez is trying to assign itself an authority to tax that simply is not rationally related to values connected with the City.

To be sure, "the States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders." *Norfolk & W. Ry.*, 390 U.S. at 324. But the problem here is not that the Valdez formula is inexact; it is that, by its structure, the formula necessarily taxes extraterritorial values. After all,

> [t]he taxation of property not located in the taxing State is constitutionally invalid, both because it imposes an illegitimate restraint on interstate commerce and because it denies to the taxpayer the process that is his due. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state

> plainly beyond its borders." Any formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State.

Id. at 325 (footnotes and citations omitted) (quoting *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362, 365 (1940)). It may be that "[t]he facts of life do not neatly lend themselves to the niceties of constitutionalism; but neither does the Constitution tolerate any result, however distorted, just because it is the product of a convenient mathematical formula." *Id.* at 327. The Valdez tax therefore reflects "an unconstitutional attempt to exercise state taxing power on out-of-state property." *Id.* at 321.

Like its parallel error regarding the Tonnage Clause, the Alaska Supreme Court's holding under the Commerce and Due Process Clauses warrants review. This Court has acknowledged that the taxation of interstate commerce "provide[s] the opportunity for a State to export tax burdens and import tax revenues" (*Trinova*, 498 U.S. at 374), making it essential that "[t]he Commerce Clause prohibit[] this competitive mischief." *Ibid.* The Alaska Supreme Court disregarded that mandate, in the process misunderstanding *Japan Line*, ignoring the relevant portion of *Central Railroad*, and challenging the continuing validity of a doctrine – the rule recognizing the authority of the domicile to tax all property to the extent it does not have a situs elsewhere – that has been endorsed, and never called into question, by this Court. That is especially notable because other state courts have continued to recognize and apply the domicile preference. Such a holding should be set aside.

* * * *

One final point bars emphasis. This Court has recognized its special role in policing state actions that disadvantage and discriminate against the interests of other States. Whether or not "the facts of this particular case, viewed in isolation, * * * appear to pose any threat to the health of the national economy," the Court, in language that applies equally to the Tonnage, Commerce, and Due Process Clauses, has explained that

> history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that [Valdez's] statute represents would invite significant inroads on our "national solidarity."

Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564, 595 (1997) (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)).

In light of this important principle, the Court has acknowledged its "'duty to determine whether the statute under attack, whatever its name may be, will in its practical operation'" contravene constitutional principle. *West Lynn Creamery*, 512 U.S. at 201 (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)). For this reason, the Court has granted review and reversed in many such cases, even when

the challenge was brought to a unique tax or regulatory regime and there was no square conflict in the lower courts about the constitutionality of such a system.[9] Certainly, a tax like the one levied by Valdez should not be insulated from review simply because it so far departs from constitutional requirements that it has few parallels.

Here, the discriminatory impact of the Valdez tax is manifest. Because the decision below declined to remedy that discrimination, leaves the law in a state of confusion, and addresses legal issues that are of considerable practical importance, this Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

SEPTEMBER 2008

---

[9] See, *e.g.*, *Trinova Corp.*, 498 U.S. at 386 ("Michigan is the first and, the parties tell us, the only State to have enacted a VAT as a tax on business activity."); *Hunt-Wesson, Inc.* v. *Franchise Tax Bd. of Cal.*, 528 U.S. 458 (2000).

APPENDICES

APPENDIX A

THE SUPREME COURT OF
THE STATE OF ALASKA

Nos. S-12218/12223

CITY OF VALDEZ,
Appellant and Cross-Appellee,

v.

POLAR TANKERS, INC.,
Appellee and Cross-Appellant.

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Peter A. Michalski, Judge.

Appearances: Debra J. Fitzgerald and William M. Walker, Walker & Levesque, LLC, Anchorage, for Appellant and Cross-Appellee. Leon T. Vance, Faulkner Banfield, P.C., Juneau, and Susan Orlansky and Eric T. Sanders, Feldman Orlansky & Sanders, Anchorage, for Appellee and Cross-Appellant.

Before: Fabe, Chief Justice, Matthews, Eastaugh, and Carpeneti, Justices. [Bryner, Justice, not participating.]

EASTAUGH, Justice.

III. INTRODUCTION

The City of Valdez adopted an ad valorem property tax on large vessels docking at private facilities in Valdez, and the city council thereafter adopted an apportionment formula based on days spent in port for taxing large vessels engaged in interstate commerce. Several transporters of oil, including Polar Tankers, Inc., challenged the tax in superior court, alleging that it violated the Due Process, Commerce, and Tonnage Clauses of the Federal Constitution. We hold that the apportionment formula does not create a risk of duplicative taxation; it was therefore error to declare the ordinance unconstitutional as applied.

IV. FACTS AND PROCEEDINGS

A. Factual History

In 1999 the City of Valdez adopted Ordinance No. 99-17, an ad valorem property tax ("vessel tax") on certain large vessels docking at private facilities in the city. Part A of the ordinance describes the affected vessels:

> Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container

> Terminal where it is subject to municipal dockage charges.[1]

The city subsequently interpreted the exception for vessels docking exclusively at the Valdez Container Terminal to also apply to vessels docking exclusively at other city-owned docks. Part B of the ordinance provides for taxation on an "apportionment basis" and for adoption of assessment formulas:

> Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council.[2]

The vessel tax was proposed to address what was described as a serious erosion of the city's tax base, much of which is oil- and gas-related property. For several years before passage of the ordinance, the portion of the city's tax base consisting of oil and gas property had been declining rapidly, and it would continue to decline under a depreciation formula negotiated between the State of Alaska and the owners of the Trans Alaska Pipeline System (TAPS).

In accordance with Part B of the 1999 vessel tax ordinance, in 2000 the city council adopted a resolu-

---

[1] Valdez Ordinance 99-17 (codified as Valdez Municipal Code (VMC) 03.12.020(A) (1999)).

[2] *Id.*

tion containing an apportionment formula. Section 1 of Resolution No. 00-15 adopted a tax apportioned on the days spent in port:

> A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation.[3]

We refer to this as a "port-day" apportionment formula. The formula also exempts "periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs."[4] Section 2 of the 2000 resolution contingently provides for adoption of "another apportionment formula that will more fairly represent how value should be apportioned."[5] It provides:

> If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.[6]

---

[3] Valdez, Alaska, Resolution No. 00-15 (May 1, 2001).

[4] *Id.*

[5] *Id.*

[6] *Id.*

Polar Tankers, Inc. operates tanker vessels that transport crude oil from the TAPS terminal in Valdez to ports in Washington, California, and Hawaii. In Valdez, Polar loads crude oil at the Alyeska Marine Terminal, a private dock owned by a consortium of oil companies—the TAPS owners. Polar is a wholly owned subsidiary of ConocoPhillips Company. The city issued tax statements for each of the assessed vessels in early July of 2000, 2001, 2002, 2003, and 2004. Polar paid the assessed taxes under protest each year. The taxes it paid each year were: $440,221.24 in 2000; $398,157.62 in 2001; $1,037,530.12 in 2002; $1,433,072.20 in 2003; and $1,657,249.02 in 2004.

B. Procedural History

After the city enacted the apportionment resolution in 2000, Polar sued the city in superior court, claiming the vessel tax violated the Due Process, Commerce, and Tonnage Clauses of the Federal Constitution. Polar was initially joined by several other tankship companies. Over the next three years, the city settled with all of the plaintiffs except Polar and SeaRiver Maritime, Inc. In 2004 the superior court granted these plaintiffs' motion for summary judgment, holding that the vessel tax was an unconstitutional duty on tonnage. The city moved for reconsideration. The superior court granted the reconsideration motion, vacated its earlier ruling, and directed the parties to brief seven legal and factual questions. In January 2005 the superior court issued a decision and order ruling that the apportionment method violated the Due Process and Commerce Clauses. It declined to rule on the Tonnage Clause issue. The city moved for summary judgment on that issue, and the superior court granted the city's motion in July and

concluded that, assuming the vessel tax was fairly apportioned, the tax would not violate the Tonnage Clause.

In January 2006 the superior court issued its final judgment holding that the tax did not violate the Tonnage Clause, but that the port-day apportionment formula, as applied to the plaintiffs, violated the Due Process and Commerce Clauses. The judgment permitted the city to levy the vessel tax as soon as it adopted a constitutional apportionment formula, and required the city to repay all taxes overpaid by the plaintiffs, as calculated using the new apportionment formula. The city moved for clarification of the final judgment. The court denied the clarification motion but stayed the judgment and ordered that the city could not "levy against Plaintiffs any amount of tax beyond the amount that would be due using this apportionment formula: Days in Valdez/365." The court ordered that the amount be paid into a court-supervised account until the appeal was terminated by agreement of the parties or decision of this court. Finally, the superior court denied all parties' motions for attorney's fees.

Three parties appealed. SeaRiver eventually dismissed its appeal, and the city's and Polar's appeals were consolidated. On appeal, the city challenges the Due Process and Commerce Clause rulings and Polar challenges the Tonnage Clause ruling.

V. DISCUSSION

A. Standard of Review

We review summary judgment rulings on constitutional issues such as the Due Process, Commerce, and Tonnage Clauses de novo.[7]

B. The Vessel Tax Apportionment Formula Does Not Violate the Due Process Clause or the Commerce Clause.

Polar contends that the vessel tax violates the Due Process and Commerce Clauses of the Federal Constitution.[8] The superior court held that the tax, Valdez Ordinance 99-17, was constitutional, but that the port-day apportionment formula contained in Valdez Resolution 00-15 violated the Due Process and Commerce Clauses.[9]

Due process requires that: (1) the property taxed have a physical presence and minimal connections with the taxing sovereign (thus giving it a tax situs)[10]; and (2) the tax be fairly apportioned to "opportunities, benefits, or protection conferred or afforded by the taxing [authority]."[11]

---

[7] *Lewis* v. *State, Dep't of Corr.*, 139 P.3d 1266, 1268-69 (Alaska 2006).

[8] U.S. CONST. amend. XIV § 1; U.S. CONST. art. I, § 8, cl. 3.

[9] In its final judgment, the superior court stated that the port-day apportionment formula is contained in Valdez Resolution 00-19. This appears to be a typographical error as the port-day apportionment formula is contained in Valdez Resolution 00-15. We therefore refer to Valdez Resolution 00-15 here.

[10] *Atlantic Richfield Co.* v. *State*, 705 P.2d 418, 430 (Alaska 1985).

[11] *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949) (holding that ad valorem property tax apportioned using

In *Complete Auto Transit, Inc.* v. *Brady* the United States Supreme Court laid out the test for determining whether a tax on mobile property used in interstate commerce satisfies the Commerce Clause.[12] *The Complete Auto* test requires that: (1) the property taxed have a "substantial nexus" with the taxing jurisdiction; (2) the tax be fairly apportioned; (3) the tax not discriminate against interstate commerce; and (4) the tax be fairly related to the services provided by the jurisdiction.[13]

The Supreme Court has noted that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well ... due process requirement[s]."[14] We therefore consider minimal connection/substantial nexus and fair apportionment under both clauses simultaneously.

1. *There is a substantial nexus between Valdez and the vessels, such that Valdez has become a tax situs.*

The parties agree that Polar's presence and activities in Valdez are sufficient to permit the city to tax its vessels, and that Valdez is therefore a tax situs for Polar. Ample evidence supports this conclusion. There is a direct and significant economic connection between the city and Polar. Most of Polar's business involves the oil it loads at the Alyeska Marine Terminal in Valdez, and the parties seem to

---

miles traveled in state divided by total miles traveled did not violate Commerce or Due Process Clauses).

[12] *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977) (upholding sales tax challenged by motor carrier transporting cars into Mississippi from out of state).

[13] *Id.* at 279.

[14] *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 313 n.7 (1992).

agree that Polar's tankers spend an average of about forty-two port days in Valdez per year. Furthermore, the city provides many services to Polar. The city assists the Coast Guard in regulating traffic on dedicated "tanker lanes." The significant presence of the Coast Guard in the city is primarily due to the operations of Polar and the other oil shippers. The city tells us the Alyeska Marine Terminal, which is privately owned by the TAPS owners, was "financed by $1.3 billion in tax-exempt revenue bonds issued by the City."

Polar has at least one employee permanently located in Valdez, and Polar's employees, including the vessel crews, have access to all the services provided by the city, such as police protection, airport, roads, and hospitals. The city is involved in oil spill contingency plans. As demonstrated by the EXXON VALDEZ oil spill in 1989, the city is heavily affected by oil spills; following the EXXON VALDEZ spill, cleanup efforts continued to consume city resources for more than three years. All of these factors create a substantial nexus between the city and Polar such that Valdez has acquired the status of a tax situs for purposes of the Due Process and Commerce Clauses.

Because we agree with the parties that a substantial nexus exists, we also agree that Valdez is a tax situs for Polar.[15]

---

[15] *See Goldberg* v. *Sweet*, 488 U.S. 252, 260 (1989) (upholding excise tax under *Complete Auto* test and stating that because "all parties agree that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act, we begin our inquiry with apportionment, the second prong of the *Complete Auto* test").

2. The vessel tax is fairly apportioned.

The superior court concluded that the city's port-day apportionment formula by which the tax is calculated violates the Due Process and Commerce Clauses because the formula creates a risk of multiple taxation and is therefore not fairly apportioned. We disagree.

The "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."[16] There is no single correct method of apportionment; rather, a tax is deemed fairly apportioned if it is both internally and externally consistent.[17] Because both parties agree that the vessel tax is internally consistent (i.e., if all taxing jurisdictions used the same formula, a vessel would be taxed for one hundred percent of its value), we address only external consistency.

External consistency is the principle that looks "to the economic justification for the state's claim upon the value taxed, to discover whether a state's tax reaches beyond that portion of value that is fairly attributable to activity within the taxing state."[18] According to Hellerstein & Hellerstein, "the external consistency test in substance is nothing more than another label for the fair apportionment requirement."[19]

---

[16] *Id.* at 260-61.

[17] *Id.* at 261.

[18] I JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, STATE TAXATION ¶ 4.15[2], at 4-142 (3d ed. 1998) (citing *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995)).

[19] *Id.*

The superior court concluded that the vessel tax was not fairly apportioned because the apportionment formula created a risk of duplicative taxation. A tax may be invalid even if it creates only a risk of duplicative taxation. In *Central Railroad of Pennsylvania* v. *Commonwealth of Pennsylvania*, the Supreme Court stated that a "domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State, not merely on such property as is subjected to tax elsewhere."[20] We have similarly stated that "the Commerce Clause is triggered only upon an affirmative showing that property taxed by one jurisdiction has another taxable situs and could be taxed elsewhere."[21]

Polar admits that Valdez is a proper taxing situs. But Polar nonetheless argues that Valdez's taxing authority is subordinate to the taxing authority of Polar's domicile and that Valdez's apportionment scheme is unfair because it impinges on the domicile's taxing authority, creating the risk of multiple taxation. Polar asserts that California is its commercial domicile.

Under the home port doctrine, a vessel was subject to property taxation in full at the domicile of the owner and not elsewhere.[22] But the Supreme Court

---

[20] *Cent. R.R. of Pa.* v. *Pennsylvania*, 370 U.S. 607, 614 (1962) (emphasis added).

[21] *Kenai Peninsula Borough* v. *Arndt*, 958 P.2d 1101, 1103 (Alaska 1998) (emphasis added) (holding that Commerce Clause was not violated because vessel's tax status became fixed for full tax year on date of its assessment and it therefore could not be taxed elsewhere, even after being sold).

[22] *S. Pac. Co.* v. *Kentucky*, 222 U.S. 63, 68-69 (1911); *see also* HELLERSTEIN & HELLERSTEIN, supra note 18, at ¶ 4.12[2][c].

in *Japan Line, Ltd.* v. *County of Los Angeles* recognized that the home port doctrine has yielded to a rule of fair apportionment among situs states.[23] The Court there noted that if the containers at issue in *Japan Line* were instrumentalities of purely interstate commerce, a rule of fair apportionment would have been applied.[24]

Therefore, a rule of fair apportionment must be applied to the taxation of Polar's ships. As we discuss below, an apportionment formula is fair if it apportions the full value of a ship between the taxing jurisdictions in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. Our determination that Valdez has adopted one of the many potential fair apportionment schemes it could choose from renders Polar's assertion of home port superiority irrelevant.[25]

Valdez' s apportionment formula apportions the full value of a ship between the taxing jurisdictions

---

[23] *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 442 (1979).

[24] *Id.* at 445-46. Although it appears that some of Polar's vessels, for some of the years at issue, might have acquired a taxing situs in a foreign nation, Polar does not argue that the international aspect of its commerce affects the Valdez tax. We recognize that *Japan Line* imposes an additional test for taxation of the instrumentalities of foreign commerce, *id.* at 446-49, but we do not reach that test because the parties did not raise this issue on appeal.

[25] Polar's claim of home port superiority is not compelled by the cases that Polar cites. For example, the holding in *Central Railroad*, 370 U.S. at 611-12, 614, that a domiciliary situs cannot tax property to the extent that it could be taxed by another situs, does not define the limits of a non-domiciliary's right to tax.

in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. Thus if we assume that a tanker is in port in Valdez for fifty days a year and in port in all jurisdictions including Valdez for 150 days per year, the Valdez apportionment ratio would be 50/150. There is no reason why the days at sea outside the jurisdiction of any taxing authority should be included in the denominator of the fraction. This result is different, however, from Polar's contention that any jurisdiction is taxing for days spent at sea.[26]

The port-day formula resembles the formula that was involved in *Braniff Airways* v. *Nebraska State Board of Equalization & Assessment*, and whose reasonableness was not challenged.[27] The *Braniff* for-

---

[26] Polar's apportionment argument rests on this characterization of the Valdez tax. There is no risk of multiple taxation if Valdez uses a port-day formula and other jurisdictions use a port-day formula, voyage-day formula (number of days in jurisdiction divided by total days in a year), or voyage-distance formula (distance traveled in a jurisdiction divided by total distance). A risk of multiple taxation only exists if we accept Polar's assertion that its domicile can extraterritorially tax its vessels for all time spent on the open seas.

Polar provides no compelling reason for us to accept this assertion. Modern precedent and the repudiation of the home port doctrine in *Japan Line*, 441 U.S. at 443, suggest that a domicile possesses no such expansive powers. The *Japan Line* Court announced that the special status traditionally accorded a domicile "can claim no unequivocal constitutional source." *Id.* Polar's view of a domicile's ability to assert an extraterritorial tax conflicts with the tenor of *Japan Line*.

[27] *Braniff Airways* v. *Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 593 & n.4, 597-98 (1954). While Polar argues that the *Braniff* Court's reasoning should not be extended to ocean-going vessels, the Court's later decision in *Ja-*

mula involved the ratio of aircraft landings in the taxing jurisdiction as compared to all landings in all potential taxing jurisdictions.[28] There is not too much difference between landings and dockings, nor between dockings and days in port. Each of these measures assesses the extent of activity in the taxing jurisdiction relative to the activity in all taxing jurisdictions. This satisfies the goal of apportionment, which is "to ensure that each State taxes only its fair share of an interstate transaction."[29] Most importantly the *Braniff* formula taxed the whole aircraft in accordance with the ratio indicated by the formula without carving out some separate quantum of value for the aircraft's "home port." The home port received no special consideration even though the planes likely spent time flying over non-situs states.[30]

---

pan Line largely eliminated the distinction between ocean going vessels and other instrumentalities of interstate commerce. *Japan Line*, 441 U.S. at 442. It is notable that the *Japan Line* Court specifically cited *Braniff* in its discussion of prior opinions whose language distinguishing ocean-going vessels based on the home port doctrine the Court rejected. *Id.* (citing *Braniff*, 347 U.S. at 600).

[28] *Braniff*, 347 U.S. at 593 n.4.

[29] *Goldberg*, 488 U.S. at 260-61.

[30] A variation on *Braniff* more dramatically illustrates the point: if an airline domiciled in New York only has flights between New York City and Los Angeles, the airline would not be subject to taxation by any jurisdiction other than New York and California. The *Braniff* apportionment formula of number of landings would accord California and New York even powers of taxation. Under the home port superiority method urged by Polar, New York, the state of domicile, would have the ability to tax a plane for all times the plane was not in California.

The formula in *Ott* v. *Mississippi Valley Barge Line Co.*[31] also supplies an analogy. In that case the apportionment ratio compared the number of barge miles in Louisiana to the total number of barge miles in all state waters concerning the routes in question.[32] No special status, or even mention, was given to the vessels' home ports. In *Ott* the vessels' routes were from port to port on navigable rivers.[33] But if instead a vessel's regular route was from St. Louis, Missouri through New Orleans, Louisiana to Tampa Bay, Florida, it is hard to imagine that the denominator would have to include miles traveled on the high seas outside the taxing authority of any state.

There are of course many conceivable apportionment formulaé that might be fair.[34] The port-days formula is but one such example. Because the formula is fair, and accordingly a valid formula for Valdez to use, and because Valdez's permissible tax necessarily limits the taxing authority of Polar's domicile, there is no concern about the risk of duplicative taxation.[35] Because the tax is fairly apportioned, the tax is also externally consistent.

---

[31] *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949).

[32] *Id.* at 171.

[33] *Id.* at 170.

[34] *See Goldberg*, 488 U.S. at 261 (" '[W]e have long held that the Constitution imposes no single [apportionment] formula on the States,' and therefore have declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.' " (quoting *Container Corp. of Am.* v. *Franchise Tax Bd.*, 463 U.S. 159, 164, 171 (1983))).

[35] *See Cent. R.R.*, 370 U.S. at 614.

3. Polar waived claims of discrimination against interstate commerce and fair relation between the tax and services provided.

On appeal, Polar only devotes a single sentence to the third element of the *Complete Auto* test—whether the tax discriminates against interstate commerce—stating in its brief, "unfair apportionment itself is a form of discrimination against interstate commerce." Given the cursory nature of Polar's failure to argue this issue separately, we consider it waived.[36]

Even if we were to consider the issue on its merits, it does not appear that the vessel tax discriminates against interstate commerce. In *Moorman Manufacturing Co.* v. *Bair*, the United States Supreme Court held that a tax did not violate the Commerce Clause even if it resulted in an out-of-state company paying a greater portion of its income in taxes because the tax apportionment method "treat[ed] both local and foreign concerns with an even hand."[37] According to the Court, any "alleged disparity" was "the consequence of the combined effect" of multiple state statutes, and a single state was not responsible for that combined effect.[38] Like

---

[36] *Petersen* v. *Mut. Life Ins. Co.*, 803 P.2d 406, 410 (Alaska 1990) ("Where a point is not given more than a cursory statement in the argument portion of a brief, the point will not be considered on appeal."); *Lewis* v. *State*, 469 P.2d 689, 691-92 (Alaska 1970).

[37] *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274, 278 n.12 (1978) (upholding Iowa apportionment formula for income tax on interstate business against Due Process and Commerce Clause challenges).

[38] *Id.*

the tax in *Moorman*, the city's vessel tax applies equally to in-state and out-of-state vessels. Any effect on interstate commerce is incidental.

Polar also waived any argument regarding the fourth element of *Complete Auto*—whether the tax is fairly related to the services provided. Polar asserts that the tax is not fairly related to the services provided because the city's apportionment method "effectively treats a portion of [out-of-Valdez] time as if the tankers were present in Valdez." But because Polar has not briefed the issue we decline to address it.

Because Polar has attained a taxable situs in Valdez, and because the vessel tax is fairly apportioned, we hold that neither the tax nor the apportionment formula violates the Due Process Clause or the Commerce Clause.

C. The Vessel Tax Does Not Violate the Tonnage Clause.

In its cross-appeal Polar asserts that the tax violates the United States Constitution's Tonnage Clause,[39] which prohibits taxes that "operate to impose a charge for the privilege of entering, trading in, or lying in a port."[40] The superior court initially found that the tax violates the Tonnage Clause, but after vacating that judgment the superior court concluded that the tax does not violate the Tonnage Clause. In so ruling, the superior court noted that it had originally "misunderstood the taxpayer's argument on this matter." Because the parties agreed

---

[39] U.S. CONST. art. I, § 10, cl. 3.

[40] *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265-66 (1935) (holding fee exacted to fund regulation of harbor not unconstitutional duty of tonnage).

that no trial concerning the Tonnage Clause claim was necessary, and because (as the superior court noted) "counsel for the taxpayers ... clarified taxpayers' agreement that had the tax been properly apportioned, the City has jurisdiction to tax the tankers," the superior court dismissed Polar's Tonnage Clause challenge.

The United States Constitution forbids the states from, "without the Consent of Congress, lay[ing] any Duty of Tonnage."[41] A duty of tonnage is any tax or duty that "operate[s] to impose a charge for the privilege of entering, trading in, or lying in a port," regardless of whether it is measured by the tonnage of the vessel.[42] A fairly apportioned property tax is not a tonnage duty.[43]

Having concluded above that the disputed vessel tax is a fairly apportioned ad valorem tax on personal property, we necessarily also hold that it does not violate the Tonnage Clause. The vessels are taxed based on their value, and only those vessels that have acquired a taxable situs in Valdez are taxed.[44] Polar concedes that it has acquired a taxable situs in Valdez.

---

[41] U.S. CONST. art. I, § 10, cl. 3.

[42] *Clyde Mallory Lines*, 296 U.S. at 265-66.

[43] *In re State Tonnage Tax Cases*, 79 U.S. 204, 212-14 (1870) (stating that vessels owned by individuals and used for commercial purposes are considered property and are allowed to be taxed by states and do not fall under Tonnage Clause); *Bigelow* v. *Dep't of Taxes*, 652 A.2d 985, 987-88 (Vt. 1994) (holding that Vermont's tax was not tonnage tax because it taxed property used, not privilege of using Vermont's ports).

[44] VMC 03.12.020(A).

In *Japan Line, Ltd.* v. *County of Los Angeles*, the California Supreme Court sustained an ad valorem property tax on cargo containers against a Tonnage Clause challenge.[45] The California Supreme Court reasoned that the cargo containers were "not being taxed while in transit [but r]ather they [were] being taxed on an apportioned basis for their continuous presence in the state."[46] Like the containers in *Japan Line*, no single vessel is in the taxing situs of Valdez year-round, but as a group the tankers form a continuous presence in the city. As the California Supreme Court noted, the presence of these vessels "involves the constant use of many services provided by the (state and, here, the county); e.g., harbor facilities, roads, bridges, water supply, as well as fire and police protection."[47] Similarly, the Vermont Supreme Court upheld a personal property tax on vessels in Vermont, noting that "[t]he tax relates to police, fire, and environmental protection afforded to those who use vessels in this state."[48] Polar does not deny that municipal services are available to it in Valdez, including police, airport, civic center, and medical services. The vessel tax is therefore a le-

---

[45] *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), *rev'd on other grounds*, 441 U.S. 434 (1979). The United States Supreme Court held that the tax, as applied to Japanese shipping companies' cargo containers that were based, registered, and subjected to property tax in Japan, and were used exclusively in foreign commerce, violated the Commerce Clause. *Japan Line*, 441 U.S. at 453-54. The Court therefore did not reach the Tonnage Clause question. *Id.* at 439 n.3.

[46] *Japan Line*, 571 P.2d at 258.

[47] *Id.*

[48] *Bigelow*, 652 A.2d at 988.

gitimate property tax levied to support the services available to all taxpayers in the city, including Polar.

Polar argues that the vessel tax is invalid because it is a general revenue tax imposed only on specific vessels. But the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property. Alaska Statute 29.45.050(b)(2) provides that "[a] municipality may by ordinance ... classify as to type and exempt or partially exempt some or all types of personal property from ad valorem taxes."

Citing *Transportation Co.* v. *Wheeling*,[49] Polar argues that in order to be valid, the tax must be applied to the vessels "in the same manner" as it is applied to other property. It reasons that because the vessel tax is the only personal property tax in effect in Valdez, the vessels are not being taxed in the same manner as other property. We disagree. *Wheeling* stands for the proposition that a charge based on the value of property is not a duty of tonnage.[50] Valdez taxes the vessels' value using the same mill rate it uses for all other property, including real property.[51] It thus taxes the vessels in the same manner as other property, because the tax is based on value.

Polar contends that the vessel tax is no more than a charge for entering the Valdez port to access

---

[49] *Transp. Co.* v. *Wheeling*, 99 U.S. 273, 283-84 (1878) (noting that tax is only impermissible duty of tonnage when it is taxed as instrument of commerce without reference to value of property).

[50] *Id.*

[51] VMC 03.12.022(A), .010, .060, .170.

private facilities. Polar argues that the tax "applies only to vessels that call at the three private docking facilities in Valdez," and that it is "therefore ... a charge for being in port and not using the City's docking facilities." (Emphasis in original.) It compares the tax to one struck down by the California Supreme Court in *City of Oakland* v. *E.K. Wood Lumber Co.*[52] But *E.K. Wood Lumber* is inapt. The fee there was a flat fee, not a tax based on the value of the property.[53] The fee was imposed on all vessels landing at Oakland, regardless of whether they had obtained a taxable situs there.[54] *E.K. Wood Lumber* therefore does not persuade us that the city's ad valorem property tax is an unconstitutional duty of tonnage.

D. Other Issues

The city asserts that the final judgment is defective because it violates separation of powers and "fails to sustain Valdez's vessel tax in accordance with the law." The city also contends that the ruling should have been modified to clarify that it applies only to Polar. Because we are reversing the judgment below and remanding for entry of judgment for the City of Valdez, we do not need to address these arguments.

---

[52] *City of Oakland* v. *E.K. Wood Lumber Co.*, 292 P. 1076, 1080 (Cal. 1930) (holding that "ordinance requiring every vessel to land at the city's wharves, or, upon paying the same charge, be entitled to a permit to land at some other wharf in the city, is not a charge, as to vessels so landing elsewhere, for facilities or services furnished by the city" and thus was unconstitutional duty of tonnage).

[53] *Id.* at 1077-78.

[54] *Id.*

Reversal also makes it unnecessary to consider Polar's argument concerning attorney's fees. On remand the city will be the prevailing party for purposes of Alaska Civil Rule 82.

VI. CONCLUSION

We therefore REVERSE the judgment below and REMAND for entry of judgment for the City of Valdez.

APPENDIX B

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

POLAR TANKERS, INC., AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

FINAL JUDGMENT

January 10, 2006

IT IS ORDERED that judgment is entered as follows:

1. The port-day apportionment formula contained in Valdez Resolution 00-19 violates the Due Process and Commerce Clauses and therefore is unconstitutional as applied to Polar Tankers, Inc., and SeaRiver Maritime, Inc.

2. Valdez Ordinance 99-17, codified as Valdez Municipal Code §3.12.020, does not violate the Tonnage Clause and therefore can remain in full force and effect; however, until the City adopts a constitu-

tional apportionment formula, it can not collect any further tax under Ordinance 99-17 from Polar Tankers, Inc., or SeaRiver Maritime, Inc.

3. The City is permitted to levy the vessel tax under Ordinance 99-17 against Polar Tankers, Inc., and SeaRiver Maritime, Inc., once a constitutional apportionment formula is adopted.

4. The City shall adopt a constitutional apportionment formula and use that constitutional apportionment formula to recalculate all taxes paid by Polar Tankers, Inc., and SeaRiver Maritime, Inc., respectively, under the unconstitutional apportionment formula contained in Resolution 00-15. For each tax year, the difference between the amount of tax previously paid by Polar Tankers, Inc., and the recalculated amount will constitute the refund the City shall pay to Polar Tankers, Inc., and the difference between the amount of tax previously paid by SeaRiver Maritime, Inc., and the recalculated amount will constitute the refund the City shall pay to SeaRiver Maritime, Inc.

5. Interest shall accrue on the refund amounts at the rate of 8% per annum from the date of each individual tax payment as provided in AS 29.45.500(a). The total of all refunds and interest due Polar Tankers, Inc., as of the date of this judgment will be known as the "Polar Base Refund", and the total of all refunds and interest due SeaRiver Maritime, Inc., as of the date of this judgment will be known as the "SeaRiver Base Refund".

6. Attorneys' fees and costs may be sought by any party believing they have a right to them pursuant to the Civil Rules.

7. The total of the Polar Base Refund plus the attorneys' fees and costs awarded to Polar Tankers, Inc., if any, will be known as the "Polar Total Judgment", and the total of the SeaRiver Base Refund plus the attorneys' fees and costs awarded to SeaRiver Maritime, Inc., if any, will be known as the "SeaRiver Total Judgment". Post-judgment interest at the rate of 8% per annum as provided in AS 29.45.500(a) shall accrue on the Polar Total Judgment and on the SeaRiver Total Judgment from the date of this judgment.

DATED at Anchorage, Alaska this 10th day of January, 2006.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX C

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

ALASKA TANKER COMPANY, LLC, ET AL.,
Plaintiff,

v.

CITY OF VALDEZ
Defendant.

ORDER

July 28, 2005

The constitutionality of an *Ad valorem* property tax is contingent upon the taxed property being physically within the taxing jurisdiction. Earlier in our history, courts took the position that only the home port could tax vessels. Though other jurisdictions could charge vessels for services rendered, general taxes could not be obtained from vessels passing through a jurisdiction just to do business.

As the world has changed, so has the law. Our courts now recognize that the economic value of a vessel is in the business that it does, and that those jurisdictions within which it does business should be

allowed to tax the vessel—at rates commensurate with rates paid by locals—for the proportionate period that the vessel is within the taxing jurisdiction.

The first of these notions—the home port doctrine—goes to the power to tax. One would not expect Wisconsin to try to impose real estate taxes on properties in South Dakota. But for property in Wisconsin the power to tax is a given. With real estate the question is pretty simple.

Movable property is more complicated. The United States Constitution prohibits taxing vessels for merely being in a State. The "tonnage clause" only allows fees to be charged to a vessel for particular services rendered to it. This provision protects an important means of interstate and international commerce. While this taxing power was reserved to the Congress, Congress could allow states to impose a tonnage tax.

As the means of commerce became railroads, trucking, and airplanes, as well as vessels, the meaning and application of the tonnage clause to these new means of carriage was tentatively applied. The economic need for States to tax the instrumentalities of wealth-gathering led courts to ultimately reject the home port doctrine for vessels. The law now allows a fairly-imposed and apportioned *ad valorem*, or "property tax," on vessels as well as other personal property.

Thus, the vessels here are lawfully subject to *ad valorem* tax for the period of time during which they do business in Alaska. But they are not subject to tax, for example, for merely passing through the inland passage of Alaska. The limit on such taxes is that they be fairly imposed and apportioned.

The tonnage clause under modern taxation law really only arises if a tax fails to conform to the requirements of Commerce and Due Process Clauses of the U.S. Constitution.

This court made a ruling on January 31, 2005 granting, in effect, partial summary judgment to the taxpayer plaintiffs on the tax at issue. The ruling held that the Valdez tanker tax ordinance failed to conform to constitutional requirements because it apportions the Valdez tax in such a way that Valdez improperly taxes for periods the tankers are not within its jurisdiction.

This court found the ordinance to run afoul of the due process and commerce clause because of its apportionment scheme. But, as noted by the City in its objection to the taxpayers' proposed judgment, the Municipal Code's severability clause saves the tax itself. The court's April 19, 2005 order interlineating the City's draft recognized the viability of the tax once a proper apportionment was established.

The parties sought a status hearing, the plaintiffs asking for a ruling that the tax violates the tonnage clause. The City argued that the tonnage tax doctrine is inapplicable, because the court has already analyzed the tax using the due process clause.

The City reaches this point by observing that if there is sufficient nexus between the taxed property and the taxing jurisdiction then the property is simply subject to taxation like any other property in the jurisdiction. Though the City gently chides the taxpayers with trying to restore the now defunct "home port doctrine," in some respects the concept is reinvigorated and relied on by the City itself with an added twist: a vessel is "at home" wherever it is.

When thinking about "home port" that way, of course, it is no longer the home port doctrine as understood in the law, but it may help taxpayers and taxing jurisdictions to understand the justification and extent allowable for the taxation of objects which may be here one day and there the next.

A remnant of the "old" home port doctrine survives to the extent that it is the home port that has taxing authority when the vessel is not in any other taxing authority.

The parties agree that a trial related to the tonnage tax is unnecessary. The court had apparently misunderstood the taxpayer's argument on this matter. The court understands and has found that the tax is not one for specific services to the vessels, such as docking fees or "wharfage." The court misunderstood the taxpayers to be arguing that no public services of the City which are paid for by the tax were available to the vessels. Perhaps the court should have rejected the argument as a matter of law, since, necessarily, a general revenue tax goes to fund all municipal services. In any case, the court took the vessels' argument to be that the various benefits or municipal services elsewhere listed by the City were not available to the vessel At argument on May 26, 2005 counsel for the taxpayers further clarified taxpayers' agreement that had the tax been properly apportioned, the City has jurisdiction to tax the tankers and that general City services were provided to the taxpayers.

North Slope Borough v. *Puget Sound T & Barge*, 598 P.2d 924, 926 (Alaska 1979), stands for proposition that even involuntary presence may result in being subject to taxation. There, a vessel caught in arctic ice in the borough could be taxed though some

things in the borough were not taxed. Use of services of the borough was irrelevant as long as they were "available." 598 P.2d at 928.

The City agrees there are no material facts at issue and for that reason the court vacates its conclusion that a trial is necessary. No material facts are in dispute on this issue of the complaint.

Under recent modern law the tonnage clause has rarely arisen, due primarily to the predominance of due process and commerce clause justification for taxes on vessels.

The heart of the taxpayers' objections to the tax is the narrow tailoring of it so that it is primarily paid by oil tankers in interstate commerce. The tax is certainly designed to insure it captures a part of the wealth created by the vessels. It is clearly not as generally applicable as the City argues.

Nevertheless, the tax does apply to all vessels over a certain length that don't utilize the City's dock and are not engaged in a fishery. The failure of the City to tax more property does not make its taxation of all property of this class an unconstitutional tonnage tax.

Summary judgment is granted to the City on the tonnage tax issue.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 28th day of July, 2005.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX D

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665 Civil

POLAR TANKERS, INC. AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

SUMMARY JUDGMENT RULING

April 19, 2005

IT IS ORDERED that judgment is entered as follows:

1. The port-day apportionment formula contained in Valdez Resolution 00-15 is unconstitutional as applied to Polar Tankers, Inc. and SeaRiver Maritime, Inc.;

2. Valdez Ordinance 99-17, codified as Valdez Municipal Code § 3.12.020, remains in full force and effect unless and until a court of competent jurisdiction invalidates it; until a constitutional apportionment formula is adopted no further tax may be col-

lected under it until a constitutional apportionment funds is adopted no for other tax may be collected under it.

3. Valdez is permitted to levy the vessel tax under Ordinance 99-17 once a constitutional apportionment formula is adopted; and

4. The court has not heard argument on the amount of tax that may lawfully be retained and cannot determine the question in a vacuum.

5. The parties are to hold a teleconference with the court at their convenience to discuss the status of the case need for trial of issues related to tonnage, settlement prospects, etc.

DATED this 19th day of April, 2005.

/s/ Peter Michalski
Peter Michalski
Superior Court Judge

APPENDIX E

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665 Civil

POLAR TANKERS, INC., AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

DECISION AND ORDER

January 31, 2005

Parties agree that the tax at issue is an ad valorem property tax raising general revenue funds for the City of Valdez, which is a tax situs, but not a domicile, of the Plaintiffs' ships. On reconsideration, the Court has considered parties' original and supplemental briefings and oral arguments.

In order to pass Constitutional muster, the tax must conform to the Tonnage, Due Process, and Commerce Clauses. To avoid a finding that the tax violates the Tonnage Clause, the tax must not "impose a charge for the privilege of entering, trading in,

or lying in a port." *Clyde Mallory Lines* v. *State of Alabama ex. rel. State Docks Commission*, 296 US 261, 266 (1935). A tax will not violate the Tonnage Clause if it is imposed "for services rendered to and enjoyed by the vessel, such as pilotage, wharfage, or charges for the use of locks on a navigable river, or fees for medical inspection." *Id.* (citations omitted). Also, the Tonnage Clause will not invalidate charges to compensate a local jurisdiction for the cost of providing emergency support services to ships, even if those ships do not actually call upon such services. *New Orleans Steamship Association* v. *Plaquemines Port, Harbor & Terminal Dist.*, 690 F.Supp. 1515 (E.D. La., 1988).

To survive scrutiny under the Due Process and Commerce Clauses, the tax must be fairly apportioned by not creating even the risk of taxation by both a domiciliary state and a non-domiciliary state. *See Central Railroad Company of Pennsylvania* v. *Commonwealth of Pennsylvania*, 370 US 607 (1962). The burden rests on the taxpayer to show the risk of multiple taxation. *Id.* at 613.

Parties dispute, as a factual matter, whether the City provides services to the ships so as to escape a finding that the tax is an unconstitutional tonnage duty.

However, there is no need for the Court to rule on this factual matter because the tax creates a risk of multiple taxation by both domiciliary and non-domiciliary states, and is therefore unconstitutional under the Due Process and Commerce Clauses.

The problem with the tax is its method of calculating apportionment. Valdez' apportionment formula is: (time a ship spends in Valdez) / (all time

minus time spent in international waters). This denominator is problematic because it ignores the possibility that a domiciliary state may tax a ship while it is in international waters. *See Central Railroad*, 370 US 611 (1962) ("This Court has consistently held that the State of domicile retains jurisdiction to tax tangible personal property which has 'not acquired an actual situs elsewhere") (citations omitted).

For example, SeaRiver's ships are domiciled in Texas; thus, Texas may enact a property tax on SeaRiver's ships while they are in international waters. Since Valdez is already taxing those ships for part of the time they actually spend in international waters, there is risk of multiple taxation.

Plaintiffs' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 31st day of January 2005.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX F

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

POLAR TANKERS, INC. AND SEARIVER MARITIME, INC.,
Plaintiffs,

v.

CITY OF VALDEZ
Defendant.

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

July 26, 2004

Plaintiffs Polar Tankers, Inc., and SeaRiver Maritime, Inc. ("Plaintiffs") have moved for summary judgment on the issues in this case. The basis for the motion is that the City of Valdez's Ordinance 99-17, codified at Valdez Municipal Code Section 3.12.020 (the "Tanker Tax"), violates the Tonnage, Due Process, and Commerce Clauses of the United States Constitution. Defendant City of Valdez ("the City") opposes plaintiffs' motion and cross-moves for summary judgment. The City argues that it is entitled to judgment as a matter of law that the Tanker Tax does not violate the Tonnage, Due Process, and

Commerce Clauses of the U.S. Constitution. The plaintiffs' motion is **GRANTED**, and the City's cross-motion is **DENIED**. This court finds that the City's Tanker Tax violates the Tonnage Clause of the Constitution because it effectively charges only oil tankers, docking at private docks, for the privilege of entering municipal waters. Because the Tanker Tax violates the Tonnage Clause, this order does not consider whether the tax also violates the Due Process and Commerce Clauses.

DISCUSSION:

VII. Factual Background

A. The Tanker Tax

The City of Valdez imposes a property tax on property not exempted from taxation by city, state, or federal law. Prior to the 2000 tax year, the City exempted personal property from the property tax. In November 1999, effective in the 2000 tax year, the City adopted an ordinance that repealed the personal property tax exemption for a limited class of property:

> 3.12.020 **Taxation of Personal Property**
>
> A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:
>
> 1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and fair value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Con-

tainer Terminal where is subject to municipal dockage charges.[1]

All other personal property remained exempt from taxation.

The City thus targeted a specific class of personal property for taxation: federally documented vessels of at least 95 feet in length. From the limited class the City then exempted from taxation vessels engaged in some aspect of commercial fishing and those that dock exclusively at the Valdez Container Terminal, where they pay the City municipal docking charges. The City subsequently interpreted the second exemption to also apply to vessels that dock exclusively at other City-owned docks.

This enactment climaxed a long-term effort by the City to address a serious financial dilemma. A significant portion of the available tax base located in the City is oil and gas property including a section of the Trans Alaska Pipeline System ("TAPS") and the Valdez Marine Terminal of the Pipeline (the "TAPS Terminal"). This property is assessed by the State of Alaska under AS 43.56 and then taxes are shared with the City. For several years, this portion of the City's tax base had been declining rapidly and was scheduled to continue to do so pursuant to a depreciation formula negotiated between the State of Alaska and the TAPS Owners (a consortium of oil pipeline companies that own the TAPS Terminal) in the mid-1980s. During the five years before the enactment of the Tanker Tax, municipal budgets had decreased by approximately 25%. In fact, in 1997, an

---

[1] Valdez Ordinance 99-17 (codified at Valdez Municipal Code 3.12.020 A).

earlier version of the tax had been enacted to address this revenue decline but was withdrawn in an effort to work out a compromise with the effected shippers. But at the end of 1999, the City Council decided that the Tanker Tax needed to be reinstated.

B. Application of the Tanker Tax to Plaintiffs

In closed tax years 2000, 2001, 2002, and 2003 (and the current tax year), the plaintiffs owned or operated vessels subject to the Tanker Tax. Specifically, the plaintiffs own or operate tankers that take on cargoes of crude oil at the Valdez Marine Terminal of the Trans Alaska Pipeline System (the "TAPS Terminal").

The TAPS terminal is located within the territorial boundaries of the City of Valdez on the south shore of Port Valdez. The TAPS Owners own the terminal, including tanks, tanker berths and related facilities. The TAPS Owners' acquisition of the TAPS terminal site and the construction of the terminal facilities were financed in large part by tax-exempt revenue bonds issued by the City of Valdez.

Plaintiff Polar Tankers, Inc. ("Polar") is a corporation organized under the laws of Delaware with its principal place of business in Long Beach, California. Its primary business is the operation of tankers that transport cargoes of crude oil taken on at the TAPS Terminal. Polar is a wholly owned subsidiary of ConocoPhillips Company. Polar makes one of the tankers it operates available at the TAPS Terminal within a specified time frame and then delivers the cargo of crude oil to locations identified by the customer in the mainland United States or Hawaii.

Plaintiff SeaRiver Maritime, Inc. ("SeaRiver") is a corporation organized under the laws of Delaware

with its principal place of business in Houston, Texas. SeaRiver has engaged in various aspects of tanker and barge transportation of crude oil and refined oil products, primarily for ExxonMobil Corporation. SeaRiver is a wholly owned subsidiary of ExxonMobil Corporation. SeaRiver is subject to the Tanker Tax because it makes one of its vessels available at the TAPS Terminal to take on crude at a time specified by ExxonMobil. It then delivers the cargo of crude to a location specified by ExxonMobil in the mainland U.S., Hawaii, or a foreign country.

The tankers operated by the plaintiffs on which they have paid the Tanker Tax have varied somewhat over time, but all have been documented vessels over 95 feet in length. The homeports of the tankers for purposes of documentation vary, but no vessel has had Valdez as her homeport.

Consistent with the requirements the City imposed, the plaintiffs reported to the City the information it used to apportion the assessed values to the City. The City levied taxes based on the apportionment factors for tax years 2000 through 2003.[2] The plaintiffs paid these taxes under protest.[3] Plaintiffs bring this action on the grounds that the Tanker Tax violates the Tonnage, Due Process, and Commerce Clauses of the U.S. Constitution.

---

[2] In 2000, the Tanker Tax was assessed on 28 vessels. Of the 28 vessels, 24 were oil tankers. The total tax paid for the year 2000 was $1,833,709.39, which constituted about 10.1% of the total tax revenues received by the City for that year.

[3] In 2000, Polar paid $440,221.24, and SeaRiver paid $529,670.60.

VIII. Standard of Review

Under Alaska Rule of Civil Procedure 56(c), summary judgment is proper when there is no genuine issue as to any material fact and a party is entitled to judgment as a matter of law. Issues concerning the constitutionality of a law are questions of law.[4]

IX. The Tonnage Clause

The Tonnage Clause provides in part: "No state shall, without the consent of Congress, lay any duty of tonnage ... "[5] The purpose of this prohibition is to supplement the prohibitions against duties on imports and exports, also contained in Article I, Section 10:

> If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise.[6]

The prohibition extends to all ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different states, or between ports in the same state, and it makes no difference whether the ships or vessels taxed belong to the citizens of the state which levies the tax or to the citizens of another state.[7]

---

[4] *Hickel* v. *Cowper*, 874 P.2d 922, 926 (Alaska 1994).

[5] United States Constitute, Article I, Section 10.

[6] *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Commission*, 296 U.S. 261, 265 (1935).

[7] 70 Am. Jur. 2d. Shipping § 82 (citations omitted).

The term "tonnage" refers to the internal cubic capacity of the vessel, but the prohibition is not limited to exactions imposed on the basis of capacity.[8] The United States Supreme Court has ruled that the Tonnage Clause prohibits:

> all taxes and duties, regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in or lying in a port.[9]

The prohibition, however, does not extend to charges made by a state or local authority, even if graduated by tonnage, for services rendered to and enjoyed by vessels, for the use of facilities locally provided, or for the purpose of meeting the expense incident to the general supervision of the port and the execution of rules and regulations for the proper accommodation and safety of vessels at the port.[10] But if the charge attempted to be imposed is one which, by the terms of the statute or ordinance imposing it, may become due from the vessel, without any services being rendered to it, or without the enjoyment of any special benefits, and from the mere fact that it has arrived in a port of the state, it is a charge of tonnage, and therefore not collectible.[11]

The City's Tanker Tax violates the Tonnage Clause. The City admits that the tax was instituted as a means to generate general revenue, not to collect compensation for specific services. The United

---

[8] *Id.* (citations omitted).

[9] *Id.* at 265-66.

[10] 70 Am. Jur. 2d. Shipping § 82 (citations omitted).

[11] *Id.* (citations omitted).

States Supreme Court has held that the Tonnage Clause prohibits reliance on tonnage duties to raise general revenues.[12]

The City argues that the Tanker Tax is not a tonnage duty. Instead, the City asserts that it is a fairly apportioned, nondiscriminatory *ad valorem* personal property tax, based on the value of the property. However, while the term "tonnage" refers to the internal cubic capacity of the vessel, the prohibition is not limited to exactions imposed on the basis of capacity.[13] Regardless of the form of tax the City instituted, the reality of the tax is that it almost exclusively burdens large oil tankers that dock at private facilities merely for coming within the City's territorial boundaries. In fact, large vessels, and only large vessels, are the only personal property taxed by the City. In little sense then can it be considered a property tax of general application falling upon oil tankers along with other types of property. This is a tonnage duty.

But even tonnage duties are constitutionally permissible in some circumstances. As described above, charges made by state or local authorities are allowed, even if graduated by tonnage, for services made available to vessels. While the City cites the many services it offers the tankers, admittedly the

---

[12] *Clyde Mallory*, 296 U.S. at 265-66.

[13] *See supra* fn. 12. *See also Scandinavian Airlines System, Inc.* v. *Los Angeles County*, 363 P.2d 25, 40 (Cal. 1961)(fact that case involved an *ad valorem* tax rather than tax based upon tonnage did not alter underlying principle that duty imposed upon instrumentalities of commerce, which is not a charge for a specific services rendered, amounts to an impermissible tonnage duty levied as condition to being allowed to enter or leave port).

purpose of the Tanker Tax was not to charge the oil tankers for the use or potential use of these services, but instead was to raise general revenue. Thus, the tax operates to charge the tankers for the mere fact that they have arrived in the City's port. Therefore, the tax is an impermissible charge of tonnage and not collectible.

The court rules that Ordinance 99-17 is unconstitutional and invalid due to its violation of the Tonnage Clause of the United States Constitution. The City of Valdez is ordered to refund the plaintiffs all sums plaintiffs have paid to the City of Valdez under Ordinance 99-17. The City is ordered to cease from imposing or collecting from plaintiffs taxes based upon Ordinance 99-17.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 26th day of July, 2004.

/s/ Peter A. Michalski
PETER A. MICHALSKI
Superior Court Judge

APPENDIX G

CITY OF VALDEZ, ALASKA
Ordinance No. 99-17

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, AMENDING CHAPTER 3.12 OF THE VALDEZ CITY CODE TO ENACT A PERSONAL PROPERTY TAX ON VEHICLES

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that:

Section 1: Section 3.12.020 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.020 Taxation of Personal Property

A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:

1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

B. Pro ration of personal property taxes. Personal property shall be assessed once a year as of January 1 of the assessment year. Assessments on personal property shall not be pro rated for the assessment year except as follows:

1. Vessels operated in intrastate, interstate or foreign commerce that have acquired a taxable situs elsewhere, shall be assessed on an apportionment basis. The assessor shall allocate to the City the portion of the total market value of the property that fairly reflects its use in the City. The assessor shall establish formulas for calculating the proportion of the total market value allocated to the City. The assessment formula shall be approved by the city council.

C. Tax situs of personal property.

1. All personal property which has a tax situs within the city on January 1 of the tax year is subject to taxation. Tax situs means the principal place where an item of personal property is located or used, having due regard to the residence and domicile of its owner, the place where it is registered or licensed, whether it is taxed by other jurisdictions, and any other factors which may indicate the principal location of the property.

2. Tax situs shall be conclusively presumed to be within the city when the property, although not within the city on January 1 of the assessment year, either;

a. Has been or is usually, kept or used within the city, whether regularly or irregularly; or

b. Travels to or within the City along fixed and regular routes; or

c. Has been or is kept or used within the city for any ninety (90) days or more, whether consecutive or otherwise, in the twelve (12) months preceding the January 1 assessment;

d. Has been or is regularly kept or used within the city for any length of time preceding January 1 of the assessment year if such presence or use is intended to be permanent. The term "permanent", as used in this subsection means for ninety (90) days or more, whether consecutive or otherwise, within the assessment year.

e. Is necessary for business transactions or takes on cargo within the City of Valdez if such transactions or cargo have a cumulative value in excess of One Million Dollars ($1,000,000) during the tax year.

Section 2: Section 3.12.022 of the Valdez City Code is hereby enacted to read as follows:

3.12.022 Taxation of Real Property.

A. Property subject to taxation. For the purposes of this chapter, real property subject to taxation includes, among other things, trailers and mobile homes, and lean-to and similar structures attached or contiguous thereto.

B. Trailers and mobile homes. The words "trailers and mobile homes" include all forms of housing adaptable to being moved by a power con-

nected thereto, and which are or can be used for residential, business, commercial or office purpose; provided, however, that those trailers which are:

1. Used for camping or recreational purposes only; or

2. Not affixed to the site and not connected with utilities, shall be considered to be personal property and exempt from taxation.

C. Conclusive presumption. A trailer or mobile home is conclusively presumed to be affixed to the land and real property for the purposes of taxation when it has remained at a fixed site for more than ninety (90) days.

D. Ownership. When the ownership of a trailer or mobile home and attachments and appurtenances is different from the land upon which it rests, the city may, in its discretion assess and tax the ownership separately.

Section 3: Section 3.12.030 of the Valdez City Code is hereby repealed and reenacted to read as follows:

3.12.030 Property Exempt from Taxation.

A. The following property is exempt from general taxation:

1. Property exempted by state or federal law including all properties listed in A.S. 29.45.030;

2. All other personal property not subject to taxation under Section 3.12.020(A)(1);

3. The real property owned and occupied as the primary residence and permanent place

of abode by a resident sixty-five(65) years of age or older is wholly exempt from taxation. Only one exemption may be granted for the same property and, if two or more persons are eligible for an exemption for the same property, the parties shall decide between or among themselves who is to receive the benefit of the exemption. Real property may not be exempted under this subsection if the assessor determines, after notice and hearing to the parties, that the property was conveyed to the applicant primarily for the purpose of obtaining the exemption. The determination of the assessor may be appealed under A.S. 44.62.560-44.62.570.

a. An exemption may not be granted under subsection (A)(3) of the this section except upon written application for the exemption on a form approved by the state assessor for use by local assessors. The claimant must file the application no later than January 15 of the assessment year for which the exemption is sought. The city council for good cause shown may waive during a year the claimant's failure to make timely application for exemption for that year and authorize the assessor to accept the application as if timely filed. The claimant must file a separate application for each assessment year in which the exemption is sought. If an application is filed within the required time and is approved by the assessor, the assessor shall allow an exemption in accordance with the provisions of this section. If a

> failure to file by January 15 of the assessment year has been waived as provided in this subsection and the application for exemption is approved, the amount of tax that the claimant has already paid for the assessment year for the property exempted shall be refunded to the claimant. The assessor shall require proof in the form the assessor considers necessary of the right and amount of an exemption claimed under subsection(A)(3) of this section. The assessor may require proof under this section at any time.

Section 4: Section 3.12.070(E) of the Valdez City Code is hereby repealed and reenacted to read as follows:

> The assessor may require each person having ownership or control of or an interest in property to submit a return in the form prescribed by the assessor, based on property values existing on January 1, except as otherwise provided in this chapter. By written notice, the assessor may require a person to provide additional information within 30 days.

Section 5: Section 3.12.070(F) of the Valdez City Code is hereby enacted to read as follows:

> The assessor is not bound to accept a return as correct. The assessor may make an independent investigation of property returns or of taxable property on which no return has been filed. In either case, the assessor may make the assessor's own valuation of the

taxable property and this valuation is prima facie evidence of the value of the property.

1. For investigation, the assessor or the assessor's agent may enter a premise during reasonable hours and may examine property on the premise. The assessor or the assessor's agent may examine all property records involved. A person shall, on request, furnish to the assessor or the assessor's agent every facility and assistance for the investigation. The assessor may seek a court order to compel entry and production of records needed for assessment purposes.

2. An assessor may examine a person on oath. On request, the person shall submit to examination at a reasonable time and place selected by the assessor.

Section 6: Section 3.12.072 of the Valdez City Code is hereby enacted to read as follows:

Violations: Penalties.

For knowingly failing to file a tax statement required by the assessor, or knowingly making a false statement required by this chapter relative to the amount, location, kind, or value of property subject to taxation with intent to evade the taxation, a person having ownership or control of or an interest in the property subject to taxation shall be subject to a fine up to $1,000 or imprisonment for 90 days.

Section 7: This ordinance takes effect January 1, 2000.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, this 15th day of November, 1999.

CITY OF VALDEZ, ALASKA
By: /s/ David S. Cobb
David S. Cobb, Mayor

APPENDIX H

CITY OF VALDEZ, ALASKA
Resolution No. 00-15

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA ESTABLISHING A METHODOLOGY FOR APPORTIONING THE PERSONAL PROPERTY TAX ON VESSELS OVER 95 FEET IN LENGTH

WHEREAS, each year since 1985, the oil property (as defined in A.S. 43.56 et seq.) in Valdez, as assessed by the State of Alaska, has declined in value based upon a methodology agreed to between the State and the Trans Alaska Pipeline System (TAPS) owners; and

WHEREAS, the impact of this annual devaluation has caused the City of Valdez continued fiscal uncertainty and required the City to reduce its budget by approximately 25% over the past 5 years; and

WHEREAS, other similar terminal facilities are not devalued each year, as is the case with the Alyeska marine terminal in Valdez; and

WHEREAS, efforts by the City over the past 10-plus years to establish a floor in the value of the TAPS property in Valdez has been unsuccessful; and

WHEREAS, the City has taken substantial steps to bring stability to its tax base. Such efforts include financial support and participation in the creation of the Alaska Gasline Port Authority to build or cause

to be built a gasline from Alaska's North Slope to an LNG plant located in Valdez; and

WHEREAS, with the closing of the State of Alaska Harborview Developmental facility in Valdez, the City is faced with having to build its own stand-alone hospital; and

WHEREAS, the City is faced with having to replace the existing Junior High School; and

WHEREAS, on this November's statewide election is a proposition to create a statewide tax cap of 10 mills which would decrease the property tax-generated revenues received by the City by 50%; and

WHEREAS, funds received from an ad valorem tax on vessels over 95 feet in length is intended to offset the fiscal instability resulting from the continued decline in the Valdez tax base and to be able to obtain fiscal stability to allow for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities; and

WHEREAS, on November 15, 1999, the City Council adopted Ordinance No. 99-17, which provided that a documented vessel over 95 feet in length shall be taxed at its full and true value unless it is used primarily in commercial fishing or docked exclusively at the Valdez Container Terminal; and

WHEREAS, the ordinance provides that the value of a vessel that has acquired a tax situs elsewhere in addition to its tax situs in Valdez, shall be assessed on an apportioned basis; and .

WHEREAS, the Ordinance directs the Assessor to establish formulas for calculating the proportion of the total value of a vessel that fairly reflects its use

in the City, and further requires that the formula be approved by the City Council; and

WHEREAS, the Assessor has developed an apportionment formula that determines value on the basis of a ratio that compares the time a vessel spends in port in Valdez with the total time spent by the vessel in all ports; and

WHEREAS, the City Council desires to approve the formula.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, that

Section 1: Personal property tax on a vessel over 95 feet that has established a tax situs in places outside of Valdez shall be apportioned as follows:

A. A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all ports, including Valdez, where the vessel has acquired a situs for taxation;

B. The number of days in Valdez and other ports shall be determined by using the number of days spent in each port during the year prior to the tax;

C. Days in port do not include periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs;

D. The term "days in port" shall mean the time the vessel is within the city limits of the taxing jurisdiction until the vessel is outside that taxing jurisdiction's boundaries. Any

portion of a day a vessel is within the taxing jurisdiction's boundaries, that vessel will be considered to be in the city limits for that entire day.

Section 2: If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.

PASSED AND APPROVED BY THE CITY COUNCIL OF THE CITY OF VALDEZ, ALASKA, THIS 1st DAY OF May, 2000.

CITY OF VALDEZ, ALASKA
/s/ David C. Cobb
David C. Cobb, Mayor

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
NOV 10 2008
OFFICE OF THE CLERK

No. 08-310

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Alaska

BRIEF IN OPPOSITION

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Debra J. Fitzgerald
William M. Walker
Counsel of Record
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 6

I. Petitioner's Tonnage Claim Does Not Merit Review 7

A. Property Taxes On Vessels Do Not Violate The Tonnage Clause. 7

B. There Is Nothing About The City's Tax That Warrants Adopting A New Rule That Property Taxes Can Violate The Tonnage Clause 10

II. Petitioner's Commerce And Due Process Clause Argument Does Not Merit Review .. 15

A. The City Taxes Only Its Fair Share Of The Value Of Petitioner's Vessels. 16

B. The Tax Resolution's Savings Clause Renders Petitioner's Double Taxation Argument Purely Hypothetical 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 21

Asarco Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982) 20

Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232 (1890) 11

Braniff Airways v. Neb. State Bd. of Equalization & Assessment, 347 U.S. 590 (1954) 12

Cent. R.R. Co. v. Pennsylvania, 370 U.S. 607 (1962) 16, 17, 18, 19

Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 8, 11, 14

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 15

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) 17

Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734 (1978) 14

Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980) 8

Goldberg v. Sweet, 488 U.S. 252 (1989) 17

Huse v. Glover, 119 U.S. 543 (1886) 7, 14

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 17

MeadWestvaco Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498 (2008) 20

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 12, 13, 14

Nat'l Park Hospitality Ass'n v. Dep't of Interior, 538 U.S. 803 (2003) 21

New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist., 690 F. Supp. 1515 (E.D. La. 1988) 14

Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n, 390 U.S. 317 (1968) 16, 17, 18

Ott v. Miss. Valley Barge Line Co., 336 U.S. 169 (1949) 17, 20

Packet Co. v. Catlettsburg, 105 U.S. 559 (1881) 14

Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) 19

Quill Corp. v. North Dakota, 504 U.S. 298 (1992) 11

Smith v. Turner, 48 U.S. (7 How.) 283 (1849) 8

Standard Oil Co. v. Peck, 342 U.S. 382 (1952) 17

Transp. Co. v. Wheeling, 99 U.S. 273 (1878) .. 8, 12, 13

Constitutional Provisions

U.S. Const. art. I, § 10, cl. 3 7

Statutes

Alaska Stat. § 29.45.050(b)(2) 4

Alaska Stat. § 29.45.070 11

Alaska Stat. § 29.45.080 ..... 3, 11

Alaska Stat. § 43.56.010 ..... 3, 11

Valdez Municipal Code § 3.12.010 ..... 3, 4

Valdez Municipal Code § 3.12.020 ..... 3, 4

Valdez Municipal Code § 3.12.022 4

Valdez Municipal Code § 3.28.010 ..... 4, 11

Valdez Municipal Code § 3.28.020 ..... 4, 11
Valdez Municipal Code § 3.12.020(A)(1) 4
Valdez Municipal Code § 3.12.070(A) 8

Other authority

Burroughs, W.H., *A Treatise on the Law of Taxation* (1877) 12
City of Valdez, Draft Budget (2009), *available at* www.ci.valdez.ak.us/documents/2009DraftBudgetCouncilReview.pdf 9

STATEMENT OF THE CASE

1. The City of Valdez is a municipality of about 4500 people situated on Prince William Sound, Alaska. The southern terminus of the Trans-Alaska Pipeline System (TAPS) and Port Valdez are within City limits. Due to its location, the City has a substantial and continuous relationship with oil tankers and related vessels. Through subsidiary shipping companies, the five oil companies that collectively operate TAPS – Exxon Mobil, British Petroleum, ConocoPhillips, Koch Industries, and Unocal (now Chevron) – load hundreds of millions of barrels of crude oil each year at Port Valdez, and then transport the oil to various West Coast refineries.

The oil shippers' activities impact the City in significant ways. The regular presence of oil shipping vessels places an average of an extra 550 people within the City each year. Dft's Alaska S. Ct. Reply Br. 2. This represents a more than ten percent increase in the City's total population. As oil company executives have acknowledged (Exc. 441), oil company employees enjoy the benefits and services that the City provides its residents, including use of roads, publicly financed healthcare providers, and hospitals and emergency facilities. Dft's Alaska S. Ct. Br. 19-20. Oil companies also use the municipal airport to facilitate crew changes, where crew members of vessels switch out before vessels depart Port Valdez. Exc. 477.

The continuous presence of oil tankers also requires the City to expend resources specifically aimed at facilitating the commerce in which the tankers are engaged and responding to their

environmental impacts. For example, the City provides docking facilities for oil tankers to use when being repaired, or when there is not enough room in the TAPS Terminal. The City also assists in maintaining the flow of marine traffic by advertising and posting notices directed at clearing out non-tanker traffic. Dft's Alaska S. Ct. Br. 18-19.

The most serious environmental event occasioned by the tankers occurred in 1989. In March of that year, the *Exxon Valdez* ran aground on a reef in Prince William Sound, just twenty miles outside of the City. The vessel spilled eleven million gallons of toxic crude oil, coating parts of the shoreline of Prince William Sound and the Gulf of Alaska. During the ensuing three years, thousands and then hundreds of clean-up workers inhabited the City. These workers stayed on a vessel docked at a City-owned facility and consumed City resources. Their presence stressed landfill and sewage ponds beyond existing capacities; City administration officials held staff meetings twice daily to coordinate the workers' clean-up efforts; and City employees were diverted from their regular jobs to attend to clean-up duties. Dft's Alaska S. Ct. Br. 21 & n.41.

In response to the *Exxon Valdez* disaster, the City adopted a number of new emergency response measures. The City now allows the oil shipping companies to use its Civic Center for emergencies and emergency preparedness purposes. Dft's Alaska S. Ct. Br. 20 n.37. It coordinates with oil shippers, including petitioner, in holding periodic "oil spill drills" at the City's Civic Center, diverting its law enforcement and managerial personnel to participate in the drills. The City also makes its police,

firefighters, emergency response teams, and medical resources available to oil shippers in the event of oil spills. *Id.* at 20 & n.37.

Finally, the City has stepped up its national security services in the wake of the terrorism attacks of September 11, 2001, to protect the pipeline and the Port. In collaboration with the federal government, the City has installed and operates an infrared surveillance system. Expanded "security zones" in Port Valdez limit residents' free enjoyment of their natural resources. In December 2003, pursuant to a national "Code Orange" alert, Port Valdez was shut down, and the City's law enforcement personnel guarded vessels on rotating twelve-hour security shifts, diverting them from other tasks. Dft's Alaska S. Ct. Br. 18-19 n.34.

2. Like countless other municipalities across the country, the City assesses an ad valorem property tax on certain property within its jurisdiction. The City applies a single mill rate (twenty mills or two percent) to all property it taxes, including mobile homes, trailers, recreational vehicles, oil and gas production and pipeline property,[1] and (as elaborated below) certain vessels. *See* Valdez Municipal Code

---

[1] In the trial court, the Valdez City manager stated, using imprecise language, that oil and gas property within Valdez's city limits is "taxed by the State of Alaska under [Alaska Statute] 43.56 and subsequently shared with the City." Exh. A to Dft's Mem. in Support of Summary Judgment. In fact, the City levies and collects this tax and then the State gives the taxpayer a credit towards its taxation of the same property. *See* Alaska Stat. §§ 29.45.080, 43.56.010; Valdez Municipal Code §§ 3.28.010-.020.

§§ 3.12.010-.022, 3.28.010-.020; Pet. App. 45a-47a; Dft's Alàska S. Ct. Reply Br. 36. The City uses revenue generated from the tax to pay for the various municipal services it provides, including the community hospital, sewage systems, utilities, roads, municipal airport, law enforcement services, and emergency response systems.

For over two decades, the City provided all of the benefits listed above at no cost to oil shipping companies. But in 1999, the City extended its property tax to cover oil tankers and certain other non-oil-shipping vessels over ninety-five feet in length.[2] The 1999 ordinance instructed the City Assessor to "allocate to the City the portion of the total market value of [each covered vessel] that *fairly reflects its use in the City.*" Pet. App. 46a (emphasis added). In a subsequent resolution, the City approved the City Assessor's default formula of taxation, which apportions value according to the number of days spent in Port Valdez divided by the number of days in all ports, or tax situses. *Id.* at 55a. The Resolution further provides that a taxpayer may petition the City for a different apportionment formula if it feels the apportionment method "does not reasonably represent the portion of the total value of the vessel that should be" attributed to the

---

[2] The tax exempts vessels used "primarily in some aspect of commercial fishing" and vessels that dock at the Valdez Container Terminal. (The latter already are subject to a separate municipal dockage charge. Valdez Municipal Code § 3.12.020(A)(1)). A state statute allows cities to exempt "some or all types of personal property from ad valorem taxes." Alaska Stat. § 29.45.050(b)(2).

City as a tax situs. *Id.* at 56a. The ordinance took effect in 2000. *Id.* That year, tax revenue from vessels constituted less than eleven percent of the City's tax revenue.

3. Petitioner Polar Tankers, Inc., is the oil shipping company that ConocoPhillips owns for purposes of transporting TAPS oil to ports in Hawaii, Washington, and California. Polar's principal place of business during the tax years in question was California. Pet. for Cert. 4.

The City is the only tax situs that imposes a property tax upon petitioner's vessels that call at Port Valdez. Exc. 385; Dft's Alaska S. Ct. Br. 9. Under the City's apportionment formula, petitioner paid taxes from 2000 to 2004 on only about twenty-six percent of its vessels' value. Dft's Alaska S. Ct. Reply Br. 5. During those years, that amounted to between $400,000 and $1.7 million annually. Pet. App. 5a.

4. Unhappy with this system, petitioner sued the City, challenging the constitutionality of its property tax for the tax years 2000 to 2004. Petitioner argued, among other things, that the property tax was an unconstitutional duty of tonnage because it effectively charged for the privilege of entering and using the City's port. Petitioner also claimed that the tax violated the Due Process and Commerce Clauses because the City's apportionment formula allowed it to tax too high a percentage of the oil tankers' value.

The trial court held that the tax violated the Due Process and Commerce Clauses insofar as its apportionment formula created a "risk of multiple taxation." Pet. App. 34a. After further proceedings,

the court found that the tax – to the extent it is fairly apportioned – does not violate the Tonnage Clause because it is "a general revenue tax [that] goes to fund all municipal services" to petitioner's vessels and their personnel. Pet. App. 29a-30a.

The Alaska Supreme Court upheld the property tax in its entirety, reversing the trial court's Commerce and Due Process Clause ruling and affirming its Tonnage Clause ruling. *See* Pet. App. 1a-22a. The Alaska Supreme Court first determined that the City's tax easily satisfied this Court's Commerce Clause jurisprudence. As is most relevant here, the court held that the tax is "fairly apportioned" in that it does not impinge on any other situs's right to tax the vessels. Pet. App. 10a-15a. With respect to the Tonnage Clause, the Alaska Supreme Court recognized that a fairly apportioned property tax is not a duty of tonnage. *Id.* at 18a. Because petitioner's vessels were "taxed based on their value," consistent with a typical property tax, the court held that this Court's precedents "necessarily" dictated that the Tonnage Clause was not violated. *Id.*

REASONS FOR DENYING THE WRIT

There is no need for this Court to review the modest municipal property tax at issue in this case. Petitioner concedes that there is no "square conflict in the lower courts about the constitutionality" of a property tax similar to the City's. Pet. for Cert. 31. In fact, and in more plain terms, petitioner is unable to cite a single court that has ever held that a property tax assessed against vessels violates the Constitution. Nor does the tax present a question of

national importance. It is an unremarkable property tax issued by a single municipality. Petitioner paid well under $2 million in the tax years at issue on vessels worth hundreds of millions of dollars, carrying cargo worth billions of dollars. These are reasons alone to deny review.

Petitioner nonetheless argues that certiorari is warranted because the Alaska Supreme Court's decision upholding the tax is "manifestly inconsistent with this Court's precedents." Pet. for Cert. 7. Petitioner fails to make such a showing. It is well settled that a property tax levied against vessels does not run afoul of the Tonnage Clause. And nothing in this Court's jurisprudence renders the "port day" apportionment method the City uses a violation of the Commerce or Due Process Clause.

I. Petitioner's Tonnage Claim Does Not Merit Review.

The Alaska Supreme Court rejected petitioner's Tonnage Clause argument in an unremarkable ruling that does nothing more than apply long-settled law. This Court has squarely held that property taxes are not duties of tonnage, and there is nothing special about this tax that should subject it to some new kind of constitutional scrutiny.

A. Property Taxes On Vessels Do Not Violate The Tonnage Clause.

The Tonnage Clause prohibits states or municipalities from "laying a duty of tonnage." U.S. Const. art. I, § 10, cl. 3. A duty of tonnage is a fee imposed "upon a vessel, according to its tonnage, *as an instrument of commerce*, for entering or leaving a

port, or navigating the public waters of the country." *Huse v. Glover*, 119 U.S. 543, 549-50 (1886) (emphasis added); *see also Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265 (1935) (duties of tonnage are "levies upon the privilege of access by vessels or goods to the port"). By forbidding states from imposing duties on ships for the use of ports and harbors, the Tonnage Clause prevents states from "taxing vessels [only for] transporting merchandise" without any connection to services the taxing state provides. *Clyde Mallory Lines*, 296 U.S. at 265.

In light of the Tonnage Clause's limited purpose, it is "too well settled to admit of question" that property taxes on vessels do not violate the Clause. *Transp. Co. v. Wheeling*, 99 U.S. 273, 279 (1878). In the course of upholding a property tax used for municipal purposes in *Wheeling*, this Court explained that states, consistent with the Tonnage Clause, "may tax a ship or other vessel used in commerce the same as other property owned by its citizens." *Id.* at 282 (discussing *Smith v. Turner*, 48 U.S. (7 How.) 283 (1849)).

As the Alaska Supreme Court recognized, the tax at issue, in both label and function, is a property tax "based on the[] value" of the property at issue – here, vessels. Pet. App. 18a. The City assesses all taxable property, including vessels, at its "true and full" market value. Valdez Municipal Code § 3.12.070(A). The City tax code further mandates that "all assessments [] be uniform and equal and based upon the actual value of the property assessed." *Id.*

As with other property taxes, the City uses the revenue obtained through the property tax – about eleven percent of which came from vessels during

2000 – to fund myriad services offering the "advantages of a civilized society," *Exxon Corp. v. Wis. Dep't of Revenue*, 447 U.S. 207, 228 (1980) (citation omitted), to the City's residents and visitors, including petitioner's employees. The property tax revenue enables the City – now, as in the tax years at issue here – to provide police protection, fire protection, a local hospital with ambulance services, a municipal airport, construction and maintenance of roads and transportation facilities, a post office, sanitation and refuse disposal facilities, and maintenance of other city infrastructure. Dft's Alaska S. Ct. Br. app. A; City of Valdez, Draft Budget (2009), *available at* www.ci.valdez.ak.us/documents/2009DraftBudgetCouncilReview.pdf. In addition, the City maintains a school district, community college, animal control department, library, local parks and recreation facilities, and supports various community service organizations, such as the Valdez Arts Council, Valdez Senior Citizens, and the Valdez Museum. City of Valdez, Draft Budget (2009).

As the terminus of the Trans-Alaska Pipeline, the City also provides services specifically to petitioner to facilitate the transport of hundreds of millions of barrels of crude oil leaving Alaska each year. The City allows petitioner to use its municipal airport to facilitate crew changes. Exc. 477. When vessels need divers to repair leaks, both personnel and supplies travel through the municipal airport. Dft's Alaska S. Ct. Br. 19 n.36. And through advertising and notices, the City maintains an orderly flow of marine traffic. *Id.* at 19.

The City uses the revenue it obtains from its property tax to plan for and respond to

environmental impacts of the presence of the oil shippers. The City coordinates emergency "oil spill drills" with petitioner and other oil shippers at the Civic Center. Dft's Alaska S. Ct. Br. 20 & n.37. These drills require the participation of the City Manager and police personnel. *Id.* at 20. Police, firefighters, emergency response teams, and medical resources are all made available to petitioner in the event of an oil spill. *Id.*

Finally, in the wake of the attacks of September 11, 2001, the City expends significant resources to secure and protect its Port. The City has installed and operates an infrared surveillance system for the port. The City also supports the federal government's doubled Coast Guard presence. Under a national "Code Orange" alert in December 2003, the federal government ordered Port Valdez to shut down, and the City's law enforcement officers worked to protect the port in rotating twelve-hour shifts. Dft's Alaska S. Ct. Br. 18-19 n.34.

B. There Is Nothing About The City's Tax That Warrants Adopting A New Rule That Property Taxes Can Violate The Tonnage Clause.

Notwithstanding the settled principle that municipalities may impose property taxes on vessels, petitioner contends that the City's property tax violates the Tonnage Clause because "it is uniquely imposed on vessels that dock in Valdez." Pet. for Cert. 14. This is incorrect. The City imposes a property tax at the same rate upon other property within its jurisdiction. But even if this Court were to

find that the City did single out vessels for this tax, that would not violate the Tonnage Clause.

1. The City's property tax applies not just to vessels but to numerous other kinds of property. The City taxes, among other things, certain private residences, trailers and mobile homes, and "lean-to and similar structures attached or contiguous thereto." Pet. App. 47a. It also taxes "oil and gas production and pipeline property" located within its jurisdiction, including vehicles, aircrafts, barges, and other chattel. Valdez Municipal Code §§ 3.28.010-.020; *see also* Alaska Stat. §§ 29.45.080, 43.56.010 (defining and granting municipalities authority to tax such property). And the City taxes all of these items at the same mill rate. Pet. App. 20a.

To be sure, the City (following state law) denominates these other pieces of property as "real property" or "Alaska Statutes Chapter 43.56 property." Pet. App. 47a; *see also* Alaska Stat. § 29.45.070. But as petitioner itself recognizes, "'the formal language of [a] tax statute'" is not important; what matters is "'its practical effect.'" Pet. for Cert. 14 n.3 (quoting *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992)); *accord Clyde Mallory*, 296 U.S. at 265-66. The practical effect of the City's property tax regime is to tax various different kinds of similar property. The fact that it taxes vessels under a different statutory provision than other property

such as mobile homes and oil transportation vehicles is irrelevant.[3]

2. In any event, petitioner is incorrect that this Court's decisions in *Wheeling* and *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), establish a "nondiscrimination principle" under which the city must tax property other than vessels in order to tax vessels. Pet. for Cert. 12. Neither decision does so.

In *Wheeling*, a city levied a tax on certain property within its jurisdiction, including plaintiffs' steamboats. Plaintiffs argued that the tax was an unconstitutional duty of tonnage insofar as it applied to ships because ships "are not subject to [s]tate taxation in any form." *Wheeling*, 99 U.S. at 285. The Court unequivocally rejected that argument, holding that taxes levied on vessels "as property based on a valuation of the same as property . . . are not within the prohibition of the Constitution." *Id.* at 279. In other words, this Court held that cities may impose taxes on vessels in the "same [manner] as in the case of other personal property." *Id.* at 285. This Court never suggested that a city had to tax non-vessel property in order to tax vessels.[4]

---

[3] It does not matter that the City also exempts certain property from its property tax. It is perfectly constitutional to exempt categories of property from taxation. *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890). Indeed, this Court has upheld taxes rife with exemptions without ever suggesting that exemptions might offend the Constitution. *See, e.g., Braniff Airways v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 592-93 (1954).

[4] The *Wheeling* Court cited W.H. Burroughs' treatise on taxation as support for the proposition that a property tax on

Nor did this Court establish any such rule in *Michelin Tire*. In that case, a city imposed a property tax on business merchandise, including the plaintiff's inventory of imported tires. *Michelin Tire*, 423 U.S. at 278-79. The plaintiff complained that the tax on the goods violated the Import-Export Clause. *Id.* at 279. The Court rejected the claim, holding that generally applicable property taxes do not violate the Import-Export Clause because they do not "severely hamper commerce or constitute a form of tribute by seaboard States to the disadvantage of other [s]tates." *Id.* at 286. "There is no reason," this Court continued, "why local taxpayers should subsidize the services used by the [shipper]; ultimate consumers should pay for such services as police and fire protection accorded the goods." *Id.* at 289.

Petitioner never cited *Michelin Tire* to the Alaska Supreme Court. Nor did it even argue that cases interpreting the Import-Export Clause bore on how to interpret the Tonnage Clause. *See* Pltf's Alaska S. Ct. Br. 9-16. Petitioner nonetheless insists now that a footnote of dicta in *Michelin Tire*

---

vessels does not violate the Tonnage Clause. Burroughs' treatise states: "The prohibition only comes into play where [vessels] are not taxed in the same manner as other property of citizens of the State, *but* where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel." W.H. Burroughs, *A Treatise on the Law of Taxation* § 63, at 91 (1877) (emphasis added). The Court inadvertently changed the "but" to an "or," *Wheeling*, 99 U.S. at 284, but the meaning of the passage is clear: the tonnage inquiry focuses on whether the vessel is taxed as property based on its value, not on whether property besides vessels is taxed.

establishes a "nondiscrimination principle under the Tonnage Clause," under which vessels cannot be singled out for taxation. Pet. for Cert. 12. The footnote says that a hypothetical law taxing the retail sale of imported but not domestic goods would be "invalidated as a discriminatory imposition that was, in fact, an import." *Michelin Tire*, 423 U.S. at 288 n.7.

Even if this Court were inclined to consider this new argument, petitioner's suggestion is unavailing. The footnote deals not with the Tonnage Clause but with the Import-Export Clause. The Import-Export Clause prohibits taxing imports as such. But the Tonnage Clause does not prohibit all taxation of vessels as such. *See Clyde Mallory*, 296 U.S. at 265-67 (holding that a port fee levied exclusively on vessels to fund "services facilitating commerce" is "neither within the historic meaning of the phrase 'duty of tonnage' nor the purpose of the constitutional prohibition"); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881) (same with respect to fee for use of wharf); *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 690 F. Supp. 1515, 1524 (E.D. La. 1988) (same with respect to port tariff imposed to fund emergency services). Rather, the Tonnage Clause prohibits only a certain kind of fee; a charge "for entering or leaving a port, or navigating the public waters of the country." *Huse*, 119 U.S. at 549-50.

Finally, the main reason for scrutinizing taxes exclusively on imports or exports is to ensure that states do not hamper interstate commerce. *Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 753-54 (1978). Since the tax at issue here

applies equally to vessels engaged in interstate and intrastate commerce, there is no risk of such favoring of local interests.

II. Petitioner's Commerce And Due Process Clause Argument Does Not Merit Review.

A tax satisfies the Commerce and Due Process Clauses if it: (1) is imposed upon property with a "substantial nexus with the taxing [s]tate"; (2) is "fairly apportioned"; (3) does "not discriminate against interstate commerce"; and (4) is "fairly related to the services provided by the [s]tate." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). Petitioner does not dispute that the City's tax satisfies the first, third, and fourth components of this test: the vessels have a substantial nexus to the City, thus rendering the City a constitutional tax situs, Pet. App. 8a; the tax applies equally to intrastate and interstate commerce; and it is related to the extensive services the City provides. Pet. App. 16a-17a; *see supra* pp. 1-3. Petitioner argues only that the City's tax fails the second part of the *Complete Auto* test – namely, that the tax "be fairly apportioned." Pet. for Cert. 19 n.5; *see also id.* at 18.

The City uses an apportionment method that taxes the portion of each vessel's value represented by dividing the number of days the vessel spends in Port Valdez by the total number of days it spends in other ports that are tax situses. Petitioner acknowledges that even under its interpretation, the Commerce and Due Process Clauses would permit the City to collect about half of this tax – the amount the City would collect if it divided the number of days

in Port Valdez by 365 instead of the total number of port days. *See* Pltf's Alaska S. Ct. Br. 27. But petitioner claims that the City cannot collect the remainder because this portion of the tax "risks imposing duplicative taxation." Pet. for Cert. 18. While no other jurisdiction taxes the vessels at all and no double taxation would occur if all ports imposed taxes identical to the City's, petitioner asserts that the vessels' domicile could impose a tax using a more aggressive apportionment forumula than the City does. Specifically, petitioner argues that California could have imposed a tax during the years at issue here not only for its fair share of port days but also for *all* days in which the vessels are on the high seas. Pet. for Cert. 20.

As with its Tonnage Clause ruling, the Alaska Supreme Court's rejection of this argument is a factbound holding that is not sufficiently important to warrant this Court's review. Furthermore, nothing in this Court's precedent supports petitioner's argument. And even if a domicile could tax for all of the days that vessels are out of port, Section Two of the Valdez tax resolution, which allows a taxpayer to petition for an adjustment of the apportionment formula, would render petitioner's claim of double taxation – even as a prospective matter – purely speculative and hypothetical, and thus unfit for current consideration.

A. The City Taxes Only Its Fair Share Of The Value Of Petitioner's Vessels.

1. The Commerce Clause requires the value of interstate property to be "apportioned among all jurisdictions in which the property has acquired tax

situs," Pet. for Cert. 19, so that each situs may "tax . . . its fair share of an interstate transportation enterprise." *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968) (citations omitted); *see also Cent. R.R. Co. v. Pennsylvania*, 370 U.S. 607, 614 (1962) (noting that "the [s]tate through which the regular traffic [of an interstate transportation enterprise] flowed could impose a property tax measured by some fair apportioning formula").

In applying this general rule of fairness, this Court has never adopted a "single constitutionally mandated method" for allocating the value of interstate property among various situses. *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 171 (1983)). To the contrary, this Court has recognized that jurisdictions need "considerable latitude" to devise tax schemes that account for the contribution of each situs. *Norfolk & W. Ry. Co.*, 390 U.S. at 324. The only formulae that raise constitutional concerns are those a claimant can demonstrate allow for "multiple taxation" of the same portion of a piece of property. *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *see also Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 446-47 (1979); *Central Railroad*, 370 U.S. at 612 ("It is only 'multiple taxation of interstate operations' that offends the Commerce Clause.") (quoting *Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952)).

2. The Alaska Supreme Court correctly held that the City's tax collects only "that portion of the value [of petitioner's property] that is fairly attributable to activity within [it]." Pet. App. 10a. In 2000, for example, petitioner's vessels spent roughly one-

quarter of their time in port in the City's port. And the City's apportionment imposed taxation based on only approximately one-quarter of the vessels' value. Dft's Alaska S. Ct. Reply Br. 5. In exchange, the City provided petitioner services that accounted for at least one-quarter of its vessels' "going-concern" – that is, their functionality and profitability. *Norfolk & W. Ry. Co.*, 390 U.S. at 323. The City provided (and continues to provide) emergency services – including allocating City employees to drills and resources to purchase warning systems – needed in the wake of the *Exxon Valdez* oil spill and for security purposes. Dft's Alaska S. Ct. Br. 18 & n.34, 20. The City also maintains petitioner's ability to access Port Valdez, directing traffic away from tanker lanes and building and maintaining docking facilities for vessel repair. *Id.* at 18, 19 n.36. Moreover, petitioner's employees have access to and use of the City's hospitals, roads, post office, airport, waste systems, and utilities. *Id.* at 19-21. Finally, petitioner and its crews rely on all of these resources and services in order to make their interstate transportation enterprise profitable and sustain themselves in between ports. *See* Pet. for Cert. 4 (noting that petitioner loads all of its oil at Port Valdez).

3. Contrary to petitioner's objection, nothing about this analysis either runs afoul of this Court's holding in *Central Railroad* or allows the City to tax in an "extraterritorial" manner.

a. This Court did not hold in *Central Railroad* – as petitioner would have it – that "a non-domicile [s]tate gets to tax the proportion of the property's value that corresponds to the proportion of the year spent by the property in that jurisdiction, and the

domicile state gets to tax the rest." Pet. for Cert. 21. Rather, *Central Railroad* considered whether a domicile could tax the claimant's property, railcars, "despite the fact that a considerable number of such cars spend a substantial portion of the tax year . . . outside the [s]tate." 370 U.S. at 608. The Court answered that the domicile could tax this property, *as long as "the facts in the record disclose [no] possible tax situs in some other jurisdiction." Id.* at 614 (emphasis added). This Court did not define the "domicile [s]tate's authority [to tax] in a case where another jurisdiction also ha[s] acquired tax situs regarding the property," as is the case here. Pet. for Cert. 21.[5]

Indeed, in the section of *Central Railroad* in which this Court considered the domicile state's tax on property that *had* acquired a tax situs in another state, this Court reiterated the right of the non-domicile situs to impose "an *apportioned* ad valorem tax." *Central Railroad*, 370 U.S. at 613. While again refraining from providing a formula to apportion property among situses, this Court held that "any domiciliary ad valorem tax" that interferes with a non-domicile situs's claim of taxation would be "render[ed] unconstitutional." *Id.* at 614.

What is more, in *Pullman's Palace Car Co. v. Pennsylvania*, this Court held that it *was* a "just and equitable method of assessment" for a non-domicile

---

[5] None of the lower court cases petitioner cites, *see* Pet. for Cert. 25-26, adopts any rigid formula governing this circumstance either, much less invalidates a tax similar to the City's.

situs to tax railroad cars according to the miles traveled in that state. 141 U.S. 18, 26 (1891). This formula would have allowed the domicile state (and all other situses) to tax the cars according to the number of miles traveled there. This Court upheld a similar taxation formula in *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949). Nothing in these opinions suggested that a domicile state could charge for more than its relative contribution measured by miles traveled in the domicile state.

Nor should that be the case here. Petitioner's vessels were domiciled during the tax years at issue in California. Under the City's apportionment formula, that domicile was fully entitled to tax the vessels in exactly the same manner as the City, without risking duplicative taxation. This Court has never held that the Constitution requires anything more.

b. Nor does the City's tax allow it to "to tax values that have no connection to Valdez." Pet. for Cert. 26. A jurisdiction improperly imposes an "extraterritorial" tax when it taxes value that is in no way "generated by the intrastate and extrastate activities of a multistate enterprise." *MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1502 (2008); *see also Asarco Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 334 (1982) (O'Connor, J., dissenting) ("The constitutionality of a state tax levied on extraterritorial business operations thus turns on whether the out-of-state business activity can be characterized as a separate business with no in-state contacts or whether instead it is a part of a unitary enterprise doing business in the State."). Because petitioner's vessels use the City's port to

load all of their oil, the value generated through the vessels' interstate transportation – regardless of whether they are in port or at sea at any given moment – derives in large part from their contacts with the City.

B. The Tax Resolution's Savings Clause Renders Petitioner's Double Taxation Argument Purely Hypothetical.

Even if petitioner's Commerce and Due Process Clause challenge to the City's "port day" formula had some merit, the tax resolution's savings clause would sap the challenge of any practical importance. Section Two of the City's tax resolution allows any shipowner that believes its tax "does not reasonably represent the portion of the total value of the vessel that should be apportioned to the [City] . . . [to petition for] the use of another apportionment formula." Pet. App. 56a. Consequently, if petitioner's domicile ever were to assess a tax against its vessels that actually subjected it to double taxation, Section Two would allow petitioner to ask the City to reapportion the tax and would allow the City to act accordingly. Even if the existence of this Section Two procedure does not render this dispute entirely "abstract" and thus jurisdictionally unripe, *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 807 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)), it surely counsels putting off any review of the City's tax at least until the constitutional harm that the "double taxation" doctrine is designed to prevent actually occurs.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Jeffrey L. Fisher
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Debra J. Fitzgerald
William M. Walker
Counsel of Record
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Bethesda, MD 20814

November 10, 2008

REPLY BRIEF

113

(3)

Supreme Court, U.S.
FILED
NOV 25 2008
OFFICE OF THE CLERK

No. 08-310

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alaska

REPLY BRIEF FOR PETITIONER

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The Valdez Vessel Tax Violates The Tonnage Clause. 2

B. The Valdez Vessel Tax Violates The Commerce Clause And The Fourteenth Amendment's Due Process Clause. 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Braniff Airways v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590 (1954) 6

Central Railroad Co. of Pa. v. *Pennsylvania*, 370 U.S. 607 (1962) 8, 9, 10

Clyde Mallory Lines v. *Alabama*, 296 U.S. 261 (1935) 2, 3, 5

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 2, 3, 6

Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976) 1, 5, 6

Norfolk & W. Ry. Co. v. *Mo. State Tax Comm'n*, 390 U.S. 317 (1968) 10

Ott v. Miss. Valley Barge Line Co., 336 U.S. 169 (1949) 9

Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891) 9

Transportation Co. v. *Wheeling*, 99 U.S. 273 (1878) 2, 4, 5

United States v. *IBM Corp.*, 517 U.S. 843 (1996) 6

CONSTITUTIONAL PROVISIONS

Commerce Clause, U.S. Const. art I, § 8, cl. 3 ..... 1, 7

Import-Export Clause, U.S. Const. art. I, § 10, cl. 2 ..... 2, 5, 6

Tonnage Clause, U.S. Const. art. I, § 10, cl. 3 ..... *passim*

TABLE OF AUTHORITIES
(continued)

Page(s)

Due Process Clause,
U.S. Const. amend. XIV 1, 7

REPLY BRIEF FOR PETITIONER

The City's formulaic recitation of catch-phrases like "factbound" and "unremarkable" in its brief opposing the petition should not obscure the troubling character of its tax – a character that comes clear from the City's own description of the levy. Large vessels are the *only* form of personal property subject to tax in Valdez; by design, Valdez is using its "peculiar geographical situation" to impose a tax that falls almost exclusively on vessels used to export "goods destined for other states." *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 285-286, 290 (1976). And the City acknowledges, albeit elliptically, that it taxes the value of the vessels for a portion of the time that they spend on the high seas. See Opp. 15-16. This Court has never approved a tax of this kind, which cannot be reconciled with either the Constitution's Tonnage Clause or with the apportionment requirement of the Due Process and Commerce Clauses.

The Court *has* acknowledged a special duty to review actions by a State (or municipality) that improperly enlarge its power and wealth at the expense of other States and the United States. See Pet. 30-31. And although the City correctly observes that courts have not had much opportunity to address discriminatory vessel taxes that purport to assert jurisdiction over ships traveling on the high seas (Opp. 6), we noted in the petition that a tax cannot be insulated from this Court's review simply because it departs so far from constitutional requirements that it has few parallels; the Court not infrequently grants review in such circumstances. See Pet. 30-31 & n.9. Here, Valdez offers no basis for leaving undisturbed its unconstitutional vessel tax. Accordingly, further review is warranted.

A. The Valdez Vessel Tax Violates The Tonnage Clause.

The Tonnage Clause complements the Import-Export Clause by preventing coastal States from taxing vessels instead of the goods they carry. To be sure, not every levy against a vessel offends the Tonnage Clause. As we explain in the petition, States may legitimately tax vessels in several ways for the services described by the City in its brief in opposition (at 4, 8-10). They may impose fees for services "such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage and the like." *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935). And they may impose a *nondiscriminatory* levy, including a personal property tax, that falls both on vessels and on other types of personal property. See *Transportation Co.* v. *Wheeling*, 99 U.S. 273, 284 (1878). But the City has taken neither of those courses; its personal property tax is not a charge for vessel-specific services[1] and falls *only* on certain vessels that are engaged in the export of oil from Alaska. The City's attempts to defend this discriminatory tax are insupportable.

1. Valdez first argues that the Tonnage Clause serves only the "limited purpose" of ensuring that taxes on vessels are proportional to their value and not their volume. Opp. 7-8. Under this view, property taxes *per se* "are not duties of tonnage" and

[1] The Tonnage Clause exception for pilotage and wharfage fees accordingly is not relevant to this case. As the trial court found, the Valdez tax is not a fee for services rendered to tankers. Pet. App. 29a. Instead, according to the Valdez City Council, its intent in enacting the vessel tax was "to offset the fiscal instability resulting from the continued decline in the Valdez tax base [in order] to be able to obtain fiscal stability." Pet. App. 54a.

there accordingly is no Tonnage Clause concern even when a State levies a tax for the purpose of capitalizing on the fortuity of its coastline to fill its general coffers. Opp. 7, 8. But this extraordinary assertion surely is wrong: the Court has expressly declared that the Clause is implicated by "all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines*, 296 U.S. at 265-266.

2. As a fallback, Valdez maintains that there is no nondiscrimination requirement under the Tonnage Clause and that, if there is, the Valdez vessel tax somehow satisfies the requirement. Neither argument can be squared with this Court's precedent.

Only one type of personal property is taxable in Valdez: vessels over 95 feet in length that are not primarily used for commercial fishing. Pet. App. 45a. Thus, smaller boats and large fishing boats are untaxed, as are cars and trucks, airplanes, and business inventory, each of which equally requires municipal services such as police and fire protection and hospital access. Valdez's intent in levying a tax against vessels was not to charge them for the services they use; rather, its intent was to compensate for "a serious erosion of the city's tax base." Pet. App. 3a.[2] In light of this evidence, and trial court's

[2] That some *real* property in Valdez is also taxed (Opp. 11-12) is immaterial. A discriminatory personal property tax that falls only on vessels is not saved simply because the jurisdiction imposes *other* taxes on other entities. Based on the plain text of the Valdez tax ordinance and its implementing resolution (see Pet. App. 53a-55a), there is no plausible explanation for the vessel tax other than the intent to use vessels engaged in inter-

explicit finding, there can be no serious claim that the vessel tax is generally applicable. The tax therefore cannot be squared with the understanding that the tonnage tax proscription "comes into play where [the vessels] *are not taxed in the same manner as the other property of the citizens.*" *Wheeling*, 99 U.S. at 284 (emphasis added).[3]

As we explain in the petition (at 11-13), this nondiscrimination requirement is an essential element of the Tonnage Clause exception for *ad valorem* property taxes. Otherwise, coastal States could tax "the privilege of access by vessels to their harbors" (*Clyde Mallory Lines*, 296 U.S. at 264-265) through discriminatory property taxes directed only at vessels. Indeed, under Valdez's view, there is no reason why the City could not tax *only* vessels visiting the

state commerce, and specifically in the export of goods through Valdez, to subsidize general local expenditures.

[3] Valdez reads the Court's statement in *Wheeling* to mean that *any* tax on a vessel comports with the Tonnage Clause so long as it is based on valuation of the vessel, even if other, comparable property is untaxed. Opp. 12. But that, of course, is *not* what the Court said in the quoted passage, and it is not what it said in the many other passages of the *Wheeling* opinion that repeated the nondiscrimination requirement. See, *e.g.*, 99 U.S. at 282 (State may tax a vessel "the same * * * as other property"); *ibid.* (vessel may be taxed "upon a valuation as for other personal property")' *id.* at 283 (vessel "may be taxed like other property"); *id.* at 284 (vessel taxed "upon a valuation as in respect to all other personal property"). In fact, the City *acknowledges* (Opp. 13 n.4) that *Wheeling* stated a rule of nondiscrimination, but blithely asserts that the Court "inadvertently" misstated the rule by misreading an 1877 treatise. As noted above, the City's broad contention is inconsistent with the rest of the *Wheeling* opinion. But if this Court in fact got something wrong in one of its decisions, the correction should be made by the Court and not by the City of Valdez.

Port of Valdez, forcing them to shoulder the entire annual tax burden for the municipality. But the Tonnage Clause was intended to prevent coastal States from benefiting from their location at the expense of the other States, a matter of considerable importance to the Framers of the Constitution. See Pet. 8-10. Valdez's interpretation of the Clause takes no account of this purpose or the historical basis for the Clause's inclusion in the Constitution.

As we explain in the petition, in like circumstances, where this Court has considered the complementary Import-Export Clause, it has relied upon the same nondiscrimination principle. See *Michelin Tire*, 423 U.S. at 288 n.7. Valdez attempts to minimize the discussion in *Michelin Tire* as "a footnote of dicta." Opp. 13-14. But the nondiscrimination principle in *Michelin Tire* is an essential part of the holding of that case (see Pet. 12 & n.2), and this Court has subsequently characterized *Michelin Tire* as concerning "nondiscriminatory ad valorem taxes." *United States* v. *IBM Corp.*, 517 U.S. 843, 853 (1996).[4] The City also asserts that the Import-Export Clause has no bearing here because that Clause "prohibits taxing imports as such" while "the Tonnage Clause prohibits only a certain kind of fee." Opp. 14. But the holding of *Michelin Tire* itself proves that only certain kinds of taxes on imports are

[4] Valdez complains that *Michelin Tire* was not cited in briefs before the Alaska Supreme Court. But the Tonnage Clause issue was briefed before and decided by that court, where petitioners argued that the vessel tax is impermissibly discriminatory. Under such circumstances, there is no obstacle to this Court's consideration of any precedent bearing on the issue. Cf. *Braniff Airways* v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590, 598-599 (1954).

unconstitutional, just as only certain types of taxes on vessels are improper. The key point is that an identical nondiscrimination rule applies under each Clause to differentiate taxes that are permissible from those that are not.[5]

In short, there would be no meaningful purpose served by the Tonnage Clause if it did not guard against taxes targeted against interstate trading vessels in circumstances like those here. Valdez cites no decision of any court upholding such a discriminatory tax and does not deny, as we showed in the petition (at 16-17 & n.4), that the decisions relied upon by the Alaska Supreme Court are inapposite because they involved challenges to generally applicable property taxes that did *not* discriminate against vessels. Here, Valdez imposes a discriminatory tax against vessels to subsidize its taxpayers. Because Valdez did not first seek the consent of Congress, its levy is unconstitutional.

B. The Valdez Vessel Tax Violates The Commerce Clause And The Fourteenth Amendment's Due Process Clause.

As we showed in the petition, the formula used by Valdez to apportion its tax also runs afoul of the Commerce Clause and the Fourteenth Amendment's Due Process Clause because it (1) allows Valdez to tax vessels for periods when they are on the high

[5] Chief Justice Marshall explained that "[a] duty of tonnage is as much a tax as a duty on imports or exports; and the same reason which induced the prohibition of those taxes, extends to this also." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824). That observation belies Valdez's suggestion (Opp. 14) that the Tonnage Clause fundamentally differs from the Import-Export Clause.

seas and outside the City's jurisdiction; and (2) subjects those vessels to the danger of duplicative taxation if their domicile chooses to tax them for the same periods. Pet. 18-29. The City recognizes that its tax has this effect. It states that apportioning the tax according to the portion of the year that vessels actually are in Valdez "would permit the City to collect about half" of the tax it actually collects (Opp. 15) – which means that it is now collecting *twice as much* as it should. And it acknowledges that its tax would be duplicated if petitioners' domicile taxed the vessels for the time that they spend on the high seas. *Id.* at 21. Whether these features render the tax unconstitutional is hardly a "factbound" question, as the City asserts (*id.* at 16); it is a pure, important, and potentially recurring issue of law. Yet the City's defense of its tax is fundamentally flawed.

First, the City asserts that it taxes only its fair share of the vessels' value because its apportionment percentage (approximately 25%) corresponds to the percentage of the total "time in port" that the vessels spent "in the City's port." Opp. 18. But this argument begs the question whether the appropriate denominator is the time the vessels spend *in port* or the time that the vessels spend *anywhere*. See Pet. 28. Valdez does not address why the port-time denominator is appropriate; instead, it lists services provided to ships such as emergency services, docking facilities, a hospital, roads, and a post office. Opp. 18. Notably, these services share one thing in common: they are *not* used by vessels when they are on the high seas. The City also tries to justify its tax by arguing that its services "account[] for at least one-quarter of [the] vessels' * * * functionality and profitability." *Ibid.* But that certainly is not true. The vessels' "functionality and profitability" derives from

their transportation of oil from one place to another, and much of that occurs on the high seas.

Second, we showed in the petition (at 20-21) that, under *Central Railroad Co. of Pennsylvania* v. *Pennsylvania*, 370 U.S. 607 (1962), and related decisions of this Court, the domicile State may tax the value of moving property for *all* the time that the property has no tax situs, while other States may tax that property for the period actually spent in those other States. The City denies that this is so (Opp. 18-19), but it is wrong. This Court held expressly in *Central Railroad* that the value of the rail cars at issue in that case "could not constitutionally be included in the computation of th[e] [domicile State's] tax" for the period when they were actually subject to another State's tax jurisdiction (*id.* at 614), but that the domicile State "was constitutionally permitted to tax, *at full value*, the remainder of [the taxpayer's] fleet of freight cars," *including cars that spent time moving "outside the domiciliary State."* *Id.* at 614, 616 (emphasis added). Although the City asserts (Opp. 18-19) – without explanation – that the Court in *Central Railroad* did not address the domicile State's authority to tax property for periods of the year when the property has no tax situs if that property also acquired tax situs for part of the year in another State, that in fact is *exactly* what *Central Railroad* held in the passage quoted above.

Under this principle, the domicile State is entitled to tax property for periods when the property has no tax situs, and other States are not. The Valdez tax plainly is inconsistent with this rule, subjecting petitioner's vessels to the danger of duplicative taxation and asserting the City's power to tax over values with which it has no substantial connection

As we explained in the petition (at 19-20, 21-22), the Valdez apportionment formula also is in obvious tension with the unchallenged understanding that the domicile State provides unique opportunities, benefits, and protections to the property owner, and to the corresponding rule that allows the domicile State to tax the *entire* value of property for periods when that property lies outside the domicile State, so long as the property has acquired no other tax situs. At that point, the domicile relinquishes its taxing authority *only* to the extent that the property is physically present in a non-domicile tax situs. The City entirely fails to address this point.[6]

Third, the City fundamentally misunderstands the due process apportionment requirement when it asserts (Opp. 20-21) that it is not taxing extraterritorial values because it has contact with petitioner's vessels. The City appears to believe that the constitutional proscription against extraterritorial taxation applies only when the taxpayer has no contact with the jurisdiction at all, or at least insufficient contact to establish a tax situs. See *id.* at 20. But if that were so, apportionment would never be necessary, at least as a matter of due process; so long as a State had jurisdiction to tax, there would be no limit on the values subject to tax. That, of course, is not the rule. Instead, when values subject to tax (whether income

[6] *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949), and *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891), cited by the City at Opp. 19-20, addressed circumstances where taxation of movable property was apportioned by comparing miles traveled in the taxing state to all miles traveled everywhere – a formula that corresponds to what we are seeking here (that is, comparing days in Valdez with all days in the year).

or property) are generated by activity in more than one State, apportionment determines the portion of those values that are fairly attributable to the taxing State and thus that may be taxed by it. See Pet. 18-19, 26-27. And taxing property for time spent on the high seas surely does not "appropriately ascertain[]" the value of "tangible assets permanently or habitually employed in the taxing State." *Norfolk & W. Ry. Co.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968).

Fourth, for this apportionment analysis, it makes no difference whether the domicile of the vessels in fact exercises its right to tax them. Instead, a taxing jurisdiction "is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as is subjected to tax elsewhere." *Central Railroad*, 370 U.S. at 614 (emphasis in original). Thus, contrary to the City's contention (Br. in Opp. 21), petitioner's claim is currently ripe and the constitutional harm is squarely presented. Valdez contends that the savings clause in its tax ordinance could operate to prevent actual instances of multiple taxation by giving petitioner an opportunity to seek use of a different apportionment formula in the event of actual multiple taxation. Whether another tax situs actually exercises its power to tax the vessels, however, is constitutionally immaterial.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

NOVEMBER 2008

JOINT APPENDIX

118

(4)

No. 08-310

Supreme Court, U.S.
FILED
JAN 26 2009
OFFICE OF THE CLERK

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

JOINT APPENDIX

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

RICHARD A. LEAVY
KWAKU A. AKOWUAH
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

Counsel for Petitioner

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
SCOTT P. MARTIN
Gibson, Dunn & Crutcher LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 955-8500

Counsel for Respondent

PETITION FOR WRIT OF CERTIORARI FILED SEPT. 8, 2008
CERTIORARI GRANTED DEC. 12, 2008

doc 11
10C 4ATATV

834986 89

TABLE OF CONTENTS

	Page
A. Relevant Docket Entries: Superior Court for the State of Alaska	1
B. Relevant Docket Entries: Supreme Court of Alaska	3
C. Polar Tankers' Second Amended Complaint, filed Jan. 6, 2004	4
D. Valdez's Answer to Second Amended Complaint, filed Jan. 20, 2004	13
E. Apportionment Submissions by Polar Tankers, Inc., for Tax Years 2000-2003	21
F. Affidavit of Dave Dengel	46
G. Valdez City Council Meeting Minutes:	
November 1, 1999	55
November 15, 1999	59
May 1, 2000	62
H. Affidavit of Nancy Peterson	72
I. W.H. Burroughs, A Treatise on the Law of Taxation	80

NOTICE

The following items have been omitted in printing this Joint Appendix because they appear on the following pages in the printed Appendix to the Petition for a Writ of Certiorari:

A. Decision of the Supreme Court of Alaska, filed April 25, 2008	1a
B. Final Judgment by the Superior Court for the State of Alaska, filed January 10, 2006	23a
C. Order by the Superior Court for the State of Alaska, filed July 28, 2005	26a

TABLE OF CONTENTS continued

Page

D. Summary Judgment Ruling by the Superior Court for the State of Alaska, filed April 19, 2005 ..... 31a

E. Decision and Order by the Superior Court for the State of Alaska, filed January 31, 2005 ..... 33a

F. Order Granting Plaintiffs' Motion for Summary Judgment by the Superior Court for the State of Alaska, filed July 26, 2004 ..... 36a

G. Valdez Ordinance No. 99-17 ..... 45a

H. Valdez Resolution No. 00-15 ..... 53a

APPENDIX A

SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

No. 3AN-00-9665CI

ALASKA TANKER CO., *ET AL.*,

Plaintiffs,

v.

CITY OF VALDEZ,

Defendant.

RELEVANT DOCKET ENTRIES*

DATE	DOCKET ENTRY
8/18/00	COMPLAINT filed
9/27/00	ANSWER filed
8/21/03	AMENDED COMPLAINT filed
9/03/03	ANSWER to AMENDED COMPLAINT filed
1/06/04	SECOND AMENDED COMPLAINT filed

* For the Court's convenience, the docket entries set forth below have been revised and reworded to reflect more accurately and clearly the actual entries contained in the lower court's docket.

DATE	DOCKET ENTRY
1/20/04	ANSWER to SECOND AMENDED COMPLAINT filed
3/09/04	MOTION FOR SUMMARY JUDGMENT filed by Plaintiffs
4/23/04	MOTION FOR SUMMARY JUDGMENT filed by Defendant
7/26/04	ORDER granting summary judgment for Plaintiffs
8/06/04	MOTION TO RECONSIDER filed by Defendant
9/23/04	ORDER granting Defendant's Motion to Reconsider and vacating summary judgment order
1/31/05	ORDER, after reconsideration, granting summary judgment for Plaintiffs as to apportionment
4/19/05	ENTRY OF JUDGMENT for Plaintiffs as to apportionment
7/28/05	ORDER granting summary judgment to Defendant on the tonnage tax issue
1/10/06	FINAL JUDGMENT
2/13/06	NOTICE OF APPEAL to Supreme Court

APPENDIX B

THE SUPREME COURT OF
THE STATE OF ALASKA

Nos. S-12218/12223

CITY OF VALDEZ,
Appellant and Cross-Appellee,

v.

POLAR TANKERS, INC.,
Appellee and Cross-Appellant..

RELEVANT DOCKET ENTRIES*

DATE	DOCKET ENTRY
2/08/06	DOCKETED CAUSE No. S12223
2/09/06	DOCKETED CAUSE No. S12218
4/17/07	Appeal ARGUED
4/25/08	OPINION reversing and remanding

* For the Court's convenience, the docket entries set forth below have been revised and reworded to reflect more accurately and clearly the actual entries contained in the lower court's docket.

APPENDIX C

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND REFUND OF TAXES

January 6, 2004

A. BACKGROUND

1. Plaintiff Polar Tankers, Inc., is a corporation organized under the laws of Delaware, with its principal place of business in California. It possesses a certificate of authority to operate in Alaska, and has filed all reports and paid all fees and taxes required by the State of Alaska. Polar Tankers owns and operates oil tankers that transport crude oil from the terminus of the Trans Alaska Pipeline System to locations in other states.

2. Plaintiff SeaRiver Maritime, Inc., is a corporation organized under the laws of Delaware, with its principal place of business in Texas. It possesses a certificate of authority to operate in Alaska, and has filed all reports and paid all fees and taxes required by the State of Alaska. SeaRiver Maritime owns and operates oil tankers that transport crude oil from the terminus of the Trans Alaska Pipeline System to locations in other states and countries.

3. Defendant City of Valdez ("the City") is a home rule city located in the Third Judicial District.

4. On November 15, 1999, the City adopted an ordinance, Ordinance No. 99-17 which repealed and amended several sections of the Valdez City

Code for the purpose of imposing a personal property tax on certain vessels.

5. In Section I, Ordinance No. 99-17 imposes the tax on vessels over 95 feet in length:

> A. Property subject to taxation. Except as otherwise provided in this chapter, the following personal property which has a tax situs within the city is subject to taxation:
>
> 1. Boats and vessels of at least 95 feet in length for which certificates of documentation have been issued under the laws of the United States are subject to taxation at their full and true value unless the vessel is used primarily in some aspect of commercial fishing or docks exclusively at the Valdez Container Terminal where it is subject to municipal dockage charges.

6. The ordinance exempts from taxation vessels otherwise subject to the tax so long as they are engaged in any aspect of commercial fishing, or so long as they dock exclusively at the Valdez Container Terminal, a dock owned and operated by the City. That dock has no crude oil storage facilities and is not used for the transportation of crude oil.

7. From time to time, but not exclusively Plaintiffs' vessels dock at the Valdez Container Terminal, for which they pay to the City the municipal docking charge.

8. Section I B 1 of Ordinance 99-17 requires that vessels with a tax situs in other jurisdictions be

taxed on an apportioned basis, one that "fairly reflects [the vessel's] use in the City." That section directs the assessor to establish an. Apportionment method, which is to be approved by the City Council.

9. On May 1, 2000, the City Council adopted Resolution No. 00-15, which establishes an apportionment formula that apportions taxable value to the City of Valdez based on a ratio between the days a vessel spent in Valdez and the days it spent in all ports where it had a tax situs, both during the year preceding assessment. The method does not include as "days in port" the days when a vessel was withheld from service due to repairs. In Section 2, the resolution permits a taxpayer to request the use of an alternative apportionment formula.

10. Early in March of 2000, 2001, 2002 and 2003, the City issued property tax assessments, including assessments based on Ordinance 99-17.

11. Plaintiffs are the owners or operators of vessels assessed under Ordinance 99-17.

12. None of the Plaintiffs' assessed vessels are engaged in commercial fishing, nor do any of the vessels dock exclusively at the City dock.

13. The City issued tax statements for each of the assessed vessels early in July of 2000, 2001, 2002 and 2003. Plaintiffs are responsible for the payment of the taxes and have paid the taxes under protest.

14. When present in Valdez during the relevant time periods, the Plaintiffs' assessed vessels were engaged in the interstate transportation of crude oil. The tanker vessels were present in Valdez solely for the purpose of taking on loads of crude oil at the terminus of the Trans Alaska Pipeline System, which is located within the city limits of Valdez.

15. After taking on a load of crude oil, the tanker vessels transported the crude oil to locations elsewhere in the United States, including California, Hawaii and Washington. Some of the vessels also transported crude oil to foreign locations, including Japan and Korea. The time the vessels spent on the high seas varied, but upon leaving Valdez, the tanker vessels generally spent from three to fourteen days on the high seas before entering another port

16. Upon delivering the crude oil to those locations outside of Valdez, the tanker vessels sometimes returned to Valdez to take on another load of crude oil. The return trip likewise generally required three to fourteen days on the high seas. At other times the vessels engaged in the transportation of crude oil between points on the west coast of the United States, or elsewhere in Alaska before making another trip to Valdez.

17. There are no drydock facilities in Valdez suitable for Plaintiffs' vessels. When the vessels were withheld from service for drydocking, they were laid up for an extended period of time in another jurisdiction in which they had a tax situs.

18. In 2000, Plaintiffs requested the use of an alternative apportionment formula under Section Two of Resolution 00-15, but the City Manager denied those requests. Plaintiffs appealed those denials to the City Council, which on July 11, 2000, upheld the denials. For the years 2001 through 2003, Plaintiffs and Defendant stipulated that requests based generally on the City's selected apportionment formula would be denied and therefore need not be made again.

B. FIRST CAUSE OF ACTION: VIOLATION OF DUE PROCESS AND COMMERCE CLAUSES

19. Ordinance 99-17, and the accompanying Resolution 00-15, improperly apportion values to Valdez that are not associated with a vessel's presence in Valdez.

This occurs because:

a. The apportionment method does not take into account the time a vessel spends on the high seas, whether on a trip to or from Valdez or between points elsewhere. A vessel on the high seas is not engaged in activity in Valdez, it does not use or have the opportunity to use any services provided by the City, and it is subject to taxation by another jurisdiction. The City's method nevertheless excludes that time from the denominator of the apportionment ratio. The ratio therefore improperly and unfairly attributes to Valdez a fixed proportion of the time a vessel spent on the high seas, even though the vessel was not within the City's jurisdiction, resulting in the taxation of extraterritorial values.

b. The apportionment method defines "days. in port" as only time when a vessel is within the city limits at a particular port and does not take into account the time a vessel spends on the territorial waters of another jurisdiction such as a borough, county, state or nation, whether on a trip to or from Valdez or between points elsewhere. A vessel on the territorial waters of another jurisdiction is not engaged :in activity in Valdez, it does not use or have the opportunity to use any services

provided by the City and it is subject to taxation by another jurisdiction. The City's method nevertheless excludes that time from the denominator of the apportionment ratio. The ratio therefore improperly and unfairly attributes to Valdez a fixed proportion of the time a vessel spent on the territorial waters of another jurisdiction, even though the vessel was not within the City's jurisdiction, resulting in the taxation of extraterritorial values.

c. The vessels are not able to obtain drydock services in Valdez, so all drydock time has occurred and will occur outside the City. The apportionment method excludes drydock time from the denominator of the apportionment calculation, improperly and unfairly attributing to Valdez a fixed proportion of time spent in drydock in other jurisdictions, even though the vessel was not within the City's jurisdiction and was subject to taxation in another jurisdiction. For a vessel that spent time in drydock, the apportionment method results in the taxation of extraterritorial values.

20. The values attributed to Valdez through the use of the ordinance and resolution are out of all appropriate proportion to values associated with Valdez, do not .bear a reasonable relationship to any opportunities, benefits or services provided by the City and result in the taxation of extraterritorial values in violation of the Due Process Clauses of the United States Constitution (Amendment XIV, § 1) · and the Alaska Constitution (Article I, § 7) and the Commerce Clause of the United States Constitution (Article I, § 8).

21. As drafted, the apportionment formula in Resolution 00-15 is not clear concerning what other taxing jurisdictions are included in the apportionment formula. If the resolution is intended only to account for time spent in other municipal taxing jurisdictions, as opposed to time spent within a borough, county, state, nation or other jurisdiction where a tax situs has been established, then the apportionment method improperly allocates to Valdez time spent in another taxing jurisdiction in further violation of the Due Process and Commerce Clauses.

C. SECOND CAUSE OF ACTION: VIOLATION OF THE COMMERCE CLAUSE

22. The City further violates the Commerce Clause because the ordinance discriminates against vessels engaged in interstate commerce. The ordinance directly and through its exemptions attempts to impose the tax only on vessels engaged directly or indirectly in the transportation of crude oil, which transportation is wholly interstate in nature. The tax is not intended to and does not apply uniformly to all types of vessels. In violation of the Commerce Clause, the ordinance singles out for taxation vessels engaged in interstate commerce.

23. Some of the vessels were engaged in foreign commerce during the relevant time period. Those vessels are subject to the threat of unapportioned taxation in foreign jurisdictions that are not subject to the oversight of the courts of the United States. For those vessels, the ordinance also violates the Foreign Commerce Clause of the United States Constitution (Article I, § 8):

D. THIRD-CAUSE OF ACTION: VIOLATION OF DUTY ON TONNAGE CLAUSE

24. The ordinance exempts from taxation smaller vessels (such as pleasure craft), vessels engaged in commercial fishing and those that exclusively use the City-owned container terminal (such as container barges and cruise ships). The effect of those exemptions is to impose a fee, in the form of the tax imposed only upon vessels engaged in interstate commerce, for the privilege of entering the port of Valdez.

25. That fee for the privilege of entering the port of Valdez violates the Duty on Tonnage Clause of the Unites States Constitution (Article I, § 10).

E. FOURTH CAUSE OF ACTION: VIOLATION OF ORDINANCE 99-17

26. The ordinance requires that when a vessel has a taxable situs elsewhere, the assessor should use an apportionment method to allocate to the City the portion of the vessel's value that "fairly reflects its use in the City." By adopting all apportionment method that ignores time spent on the high seas, time spent on the territorial waters of another state or country while outside city limits at another port, and time spent in drydock, the assessor has allocated to the City value that is attributable to a vessel's activities outside of the City.

27. The apportionment method adopted in Resolution 00-15 violates the requirements of Ordinance 99-17 by apportioning to the City value that does not fairly reflect the use of a vessel in the City.

F. REQUEST FOR RELIEF

As Ordinance 99-17, together with Resolution 00-15; violates the United States and Alaska Consti-

tutions, Plaintiffs request that the Court enter judgment in their favor as follows:

1. Declaring Ordinance 99-17 unconstitutional, invalid and unenforceable.

2. Enjoining the City of Valdez from in future years levying any taxes in reliance on Ordinance 99-17.

3. Ordering the City of Valdez to refund all taxes collected from the Plaintiffs under Ordinance 99-17, together with interest at the rate of eight percent from the date of payment, as set forth in AS 29.45.500.

4. Should the Court determine that Ordinance 99-17, together with Resolution 00-15, is not unconstitutional, then declaring that Resolution 00-15 does not comply with the requirements of Ordinance 99-17, ordering the adoption of a different apportionment method in compliance with Ordinance 99-17, and requiring a credit (together with interest) against future taxes for all overpayments resulting from the improper apportionment.

5. Awarding Plaintiffs their costs and attorneys' fees incurred in bringing this action.

6. Awarding such other relief as the Court deems just in the circumstances.

DATED this 6th day of January, 2004.

APPENDIX D

DEFENDANT CITY OF VALDEZ' ANSWER TO PLAINTIFFS' SECOND AMENDED COMPLAINT

January 20, 2004

COMES NOW, CITY OF VALDEZ ("Valdez") by and through its attorneys, Walker & Levesque, LLC, and for its answer to the Second Amended Complaint filed by POLAR TANKERS, INC.; and SEARIVER MARITIME, INC., admits, denies and alleges as follows:

A. BACKGROUND

1. Valdez lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 1 of Plaintiffs' Second Amended Complaint and therefore denies' the allegations, except Valdez admits that Polar Tankers, Inc., owns and operates tankers that transport crude oil from the terminus of the Trans Alaska Pipeline System located within the City of Valdez.

2. Valdez lacks sufficient information to form a belief as to the truth of' the allegations in Paragraph 2 of Plaintiffs' Second Amended Complaint and therefore denies the allegations, except Valdez admits that SeaRiver Maritime, Inc. owns and operates tankers that transport crude oil from the terminus of the Trans Alaska Pipeline System located within the City of Valdez.

3. Valdez admits the allegations in Paragraph 3 of Plaintiffs' Second Amended Complaint.

4. Valdez admits that on or about November 15, 1999, the City of Valdez adopted Ordinance: No. 99-17 which provides for the taxation of defined vessels. However, Valdez denies the tenor as presented by the allegations in Paragraph 4 of Plaintiffs' Second Amended Complaint.

5. Valdez admits the allegations in Paragraph 5 of Plaintiffs' Second Amended Complaint, except Valdez denies the allegation that the tax ordinance is on vessels over 95 feet in length.

6. Valdez admits the allegation contained in the first sentence of Paragraph of Plaintiffs' Second Amended Complaint. Valdez admits that the Valdez Container Dock has no crude oil storage facilities. Valdez denies the remainder of the allegations contained in Paragraph 6 of Plaintiffs' Second Amended Complaint.

7. Valdez admits the allegations contained in Paragraph 7 of Plaintiff's Second Amended Complaint that sometimes a vessel of a Plaintiff has docked at the Valdez Container Dock, for which a payment of a municipal docking charge would have been demanded. However, Valdez lacks sufficient information to form a belief as to the truth of the allegation and therefore denies that all of Plaintiffs' vessels have docked at the Valdez Container Dock and paid a docking charge.

8. Valdez admits the allegations in Paragraph 8 of Plaintiffs' Second Amended Complaint.

9. With respect to the allegations in Paragraph 9 of Plaintiffs' Second Amended Complaint, Valdez admits that the following is a portion of Resolution No. 00-15 adopted by the City on May 11 2000:

A. A vessel owner will pay the personal property tax based on 100 percent of the assessed value, times a ratio determined by the number of days spent in Valdez divided by the total number of days spent in all port, including Valdez, where the vessel has acquired a situs for taxation.

B. The number of days in Valdez and other ports shall be determined by using the number of days spent in each port during the year prior to the tax;

C. Days in port do not include periods when a vessel is tied up because of strikes or withheld from Alaska service for repairs;

D. The term "days in port" shall mean the time the vessel is within the city limits of the taxing jurisdiction until the vessel is outside that taxing jurisdiction's boundaries. Any portion of a day a vessel is within the taxing jurisdiction's boundaries, that vessel will be considered to be in the city limits for that entire day;

Section 2: If a taxpayer claims that in a particular case the apportionment formula approved in this Resolution does not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez, the taxpayer may petition, or the assessor may require, the use of another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions.

Valdez denies any and all allegations that do not accurately state the adopted resolution.

10. Valdez admits the allegations in Paragraph 10 of Plaintiffs' Second Amended Complaint, except Valdez denies the vessels assed are allegedly subject to Ordinance 99-17. The assessment of Plaintiffs' vessels may be subject to Alaska Statute 43.56, but this is still a matter of dispute with the Alaska Department of Revenue. Valdez admits that it did assess vessels subject to Ordinance 99-17.

11. Valdez admits the allegations in Paragraph 11 of Plaintiffs' Second Amended Complaint.

12. Valdez admits the allegations in Paragraph 12 of Plaintiffs' Second Amended Complaint.

13. Valdez admits the allegations in paragraph 13 of the Plaintiffs' Second Amended Complaint.

14. Valdez lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 14 of Plaintiffs' Second Amended Complaint and therefore denies the allegations, except Valdez admits that tankers owned and operated by Plaintiffs took loads of crude oil at the terminus of the Trans Alaska Pipeline System which is located within the City of Valdez.

15. Valdez lacks sufficient information to form a belief as to the truth of allegations in Paragraph 15 of Plaintiffs' Second Amended Complaint and therefore denies the allegations, except Valdez admits that tanker vessels take on crude oil to .transport from the terminus of the Trans Alaska Pipeline System, located within the City of Valdez.

16. Valdez lacks sufficient information to form a belief as to the truth of the allegations in Paragraph 16 of Plaintiffs' Second Amended Complaint and therefore denies the allegations.

17. Valdez admits that there are no dry dock facilities in Valdez suitable for vessels 95 feet or more in length. Valdez lacks sufficient information sufficient to form a belief as to the truth of the rest of the allegations in Paragraph 17 of Plaintiffs' Second Amended Complaint and therefore denies the allegations.. Plaintiffs' vessels, on occasion, do use the Valdez Container Dock for the purpose of performing repairs to the vessels.

18. Valdez admits the allegations in Paragraph 18 of Plaintiffs' Second Amended Complaint.

B. FIRST CAUSE OF ACTION: DUE PROCESS AND COMMERCE CLAUSES.

19. Valdez denies all the allegations in Paragraph 19 of Plaintiffs' Second Amended Complaint.

19(a). Valdez denies the allegations in Paragraph 19(a) of Plaintiffs' Second Amended Complaint. Valdez lacks sufficient information to form a belief as to the truth of the allegation that vessels are subject to taxation in other jurisdictions and therefore denies the allegation. However, upon information and belief, Plaintiffs do not actually pay ad valorem property taxes on the vessels at issue in this litigation in any jurisdiction other than Valdez.

19(b). Valdez denies the allegations in Paragraph 19(b) of Plaintiffs' Second Amended Complaint.

19(c). Valdez denies the allegations in Paragraph 19(c) of Plaintiffs' Second Amended Complaint, except Valdez admits that the vessels taxable under the Ordinance are not able to dry dock in Valdez. On occasion, Plaintiffs' vessels use the

Valdez Container Dock for the purpose of performing repairs to the vessels.

20. Valdez denies the allegations in Paragraph 20 of Plaintiffs' Second Amended Complaint.

21. Valdez denies the allegations in Paragraph 21 of Plaintiffs' Second Amended Complaint.

C. SECOND CAUSE OF ACTION: COMMERCE CLAUSE

22. Valdez denies the allegations in Paragraph 22 of Plaintiffs' Second Amended Complaint, except Valdez admits that the tax does not apply to all types of vessels.

23. Valdez denies the allegations in with Paragraph 23 of Plaintiffs' Second Amended Complaint, except Valdez lacks sufficient information to form a belief as to the truth of the allegation that "some vessels were engaged in foreign commerce for all or part of the year and are subject to threat of unapportioned taxation in foreign jurisdictions," and therefore denies the allegation.

D. THIRD CAUSE OF ACTION: TONNAGE CLAUSE

24. Valdez admits that there are certain types of crafts, boats or ships which are not subject to taxation under Ordinance 99-17. Valdez denies all the other allegations in Paragraph 24 of Plaintiffs' Second Amended Complaint.

25. Valdez denies the allegations in Paragraph 25 of Plaintiffs' Second Amended Complaint.

E. FOURTH CAUSE OF ACTION: ORDINANCE 99-17

26. Valdez admits that Ordinance 99-17 requires that when a vessel has a taxable situs else-

where the assessor should use an appropriation method to allocate to the City that portion of the vessel's value that "fairly reflects its use in the City". Valdez denies all of the other allegations in Paragraph 26 of Plaintiffs' Second Amended Complaint.

27. Valdez denies all the allegations in Paragraph 27 of Plaintiffs' Second Amended Complaint.

F. REQUEST FOR RELIEF

Valdez denies that Ordinance 99-17, together with the Resolution 00-15, violates the United States and Alaska Constitutions. Valdez denies that Plaintiffs are entitled to relief requested and contained in the subparagraphs 1, 2, 3, 4, 5, and 6 of "F".

G. AFFIRMATIVE DEFENSES

With regard to all the allegations in Plaintiffs' Second Amended Complaint which have not heretofore been specifically admitted or denied, the same are hereby denied.

By way of further answer, Valdez pleads the following Affirmative Defenses:

FIRST AFFIRMATIVE DEFENSE

Defendant asserts that a change of venue of this action from Anchorage to Valdez is proper and will renew its motion for a change of venue after the court heard dispositive motions.

SECOND AFFIRMATIVE DEFENSE

Plaintiffs have failed to state a claim for which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs lack legal capacity to maintain this action, in that each has failed to comply with one or more of the requirements of corporate law.

FOURTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of ratification.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs have failed to join one or more indispensable parties.

SIXTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of waiver, estoppel, quasi-estoppel, laches and/or unclean hands.

SEVENTH AFFIRMATIVE DEFENSE

Valdez relies upon the discretionary functions of AS 9.65.070(d)(2).

EIGHTH AFFIRMATIVE DEFENSE

Valdez reserves the right to add affirmative defenses as may be disclosed by the discovery to be conducted in this litigation.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for the following relief against Plaintiffs:

1. That Plaintiffs' Second Amended Complaint be dismissed.

2. That Plaintiffs take nothing by reason of their Second Amended Complaint.

3. An award of costs and attorneys' fees.

4. For such other and further relief as the Court finds to be appropriate.

Dated at Anchorage, Alaska this 20th day of January, 2004.

APPENDIX E

APPORTIONMENT SUBMISSIONS BY POLAR TANKERS, INC., FOR TAX YEARS 2000-2003

Tax Year 2000 (filed May 30, 2000)

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION AND PETITION FOR USE OF ALTERNATIVE APPORTIONMENT FORMULA UNDER RESOLUTION 00-15, SECTION 2

1. Vessel Name:
   Polar Alaska (formerly ARCO Alaska)

   Owner's Name: **ARCO Marine, Inc.**

   Owner's Mailing Address:
   P.O. Box 100360
   Anchorage, Alaska 99510-0360

   Address to which correspondence should be mailed: **Leon T. Vance**
   Faulkner Banfield, P.C.
   302 Cold Street
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 1999: **California, Washington, Alaska, Korea**

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 1999: **191**

c. Number of days the vessel spent within the City of Valdez in 1999: **53**

d. Number of days the vessel was withheld from service for repairs during 1999: **21**

3. Request for use of different apportionment formula:

Section 3.12.020 B 1 requires that vessels that have acquired a tax situs elsewhere be assessed on an apportioned basis designed to "allocate to the City the portion of the total market value of the property that fairly reflects its use in the City." The apportionment formula set forth in Section One of Resolution 00-15, as applied to this vessel, does not fairly reflect its use in the City. This vessel was on the high seas for 174 days during 1999, outside of Valdez and the other ports at which it trades, which time is not reflected in that apportionment formula. When the vessel is on the high seas, it is not used in the City, nor does it use any City services, yet the formula ignores that time, apportioning value to Valdez as if the vessel actually had been present in the City. In addition, the vessel was laid up for 21 days during the year, outside of Valdez. The apportionment formula ignores that time, even though the vessel was not in Valdez and was not utilizing any of its services. As applied to this vessel, the formula does not fairly reflect the use of the vessel in the City in violation of Valdez City Code Section 3.12.020 B 1, and violates the Due Process and Commerce Clauses of the United States Constitution. The Owner

requests the use of an apportionment formula consisting of one of the following ratios:

Days in Valdez/ 365 OR Miles Traveled in Valdez/Total Miles Traveled

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION AND PETITION FOR USE OF ALTERNATIVE APPORTIONMENT FORMULA UNDER RESOLUTION 00-15, SECTION 2

1. Vessel Name:
Polar California (formerly ARCO California)

Owner's Name: **ARCO Marine, Inc.**

Owner's Mailing Address:
P.O. Box 100360
Anchorage, Alaska 99510-0360

Address to which correspondence should be mailed: **Leon T. Vance**
Faulkner Banfield, P.C.
302 Cold Street
Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 1999: **California, Washington, Alaska**

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 1999: **208**

   c. Number of days the vessel spent within the City of Valdez in 1999: **66**

   d. Number of days the vessel was withheld from service for repairs during 1999: **0**

3. Request for use of different apportionment formula:

> Section 3.12.020 B 1 requires that vessels that have acquired a tax situs elsewhere be assessed on an apportioned basis designed to "allocate to the City the portion of the total market value of the property that fairly reflects its use in the City." The apportionment formula set forth in Section One of Resolution 00-15, as applied to this vessel, does not fairly reflect its use in the City. This vessel was on the high seas for 157 days during 1999, outside of Valdez and the other ports at which it trades, which time is not reflected in that apportionment formula. When the vessel is on the high seas, it is not used in the City, nor does it use any City services, yet the formula ignores that time, apportioning value to Valdez as if the vessel actually had been present in the City. As applied to this vessel, the formula does not fairly reflect the use of the vessel in the City in violation of Valdez City Code Section 3.12.020 B 1, and violates the Due Process and Commerce Clauses of the United States Constitution. The Owner requests the use of an apportionment formula consisting of one of the following ratios:
>
> Days in Valdez/ 365 OR Miles Traveled in Valdez/Total Miles Traveled

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION AND PETITION FOR USE OF ALTERNATIVE APPORTIONMENT FORMULA UNDER RESOLUTION 00-15, SECTION 2

1. Vessel Name:

Polar Independence (formerly ARCO Independence)

Owner's Name: **ARCO Marine, Inc.**

Owner's Mailing Address:
P.O. Box 100360
Anchorage, Alaska 99510-0360

Address to which correspondence should be mailed: **Leon T. Vance**
Faulkner Banfield, P.C.
302 Cold Street
Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 1999: **California, Alaska**

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 1999: **151**

   c. Number of days the vessel spent within the City of Valdez in 1999: **52**

   d. Number of days the vessel was withheld from service for repairs during 1999: **0**

3. Request for use of different apportionment formula:

   Section 3.12.020 B 1 requires that vessels that have acquired a tax situs elsewhere be assessed on an apportioned basis designed to "allocate to the City the portion of the total market value of the property that fairly reflects its use in the City." The apportionment formula set forth in Section One of Resolution 00-15, as applied to this vessel, does not fairly reflect its use in the City. This vessel

was on the high seas for 214 days during 1999, outside of Valdez and the other ports at which it trades, which time is not reflected in that apportionment formula. When the vessel is on the high seas, it is not used in the City, nor does it use any City services. yet the formula ignores that time, apportioning value to Valdez as if the vessel actually had been present in the City. As applied to this vessel, the formula does not fairly reflect the use of the vessel in the City in violation of Valdez City Code Section 3.12.020 B 1, and violates the Due Process and Commerce Clauses of the United States Constitution. The Owner requests the use of an apportionment formula consisting of one of the following ratios:

Days in Valdez/ 365 OR Miles Traveled in Valdez/Total Miles Traveled

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION AND PETITION FOR USE OF ALTERNATIVE APPORTIONMENT FORMULA UNDER RESOLUTION 00-15, SECTION 2

1. Vessel Name:
Polar Spirit (formerly ARCO Spirit)

Owner's Name: **ARCO Marine, Inc.**

Owner's Mailing Address:
P.O. Box 100360
Anchorage, Alaska 99510-0360

Address to which correspondence should be mailed: **Leon T. Vance**
Faulkner Banfield, P.C.
302 Cold Street

Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 1999: **California, Alaska**

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 1999: **151**

   c. Number of days the vessel spent within the City of Valdez in 1999: **51**

   d. Number of days the vessel was withheld from service for repairs during 1999: **0**

3. Request for use of different apportionment formula:

   Section 3.12.020 B 1 requires that vessels that have acquired a tax situs elsewhere be assessed on an apportioned basis designed to "allocate to the City the portion of the total market value of the property that fairly reflects its use in the City." The apportionment formula set forth in Section One of Resolution 00-15, as applied to this vessel, does not fairly reflect its use in the City. This vessel was on the high seas for 214 days during 1999, outside of Valdez and the other ports at which it trades, which time is not reflected in that apportionment formula. When the vessel is on the high seas, it is not used in the City, nor does it use any City services, yet the formula ignores that time, apportioning value to Valdez as if the vessel actually had been present in the City. As applied to this vessel, the formula does not fairly reflect the use of the vessel in the City in violation of

Valdez City Code Section 3.12.020 B 1, and violates the Due Process and Commerce Clauses of the United States Constitution. The Owner requests the use of an apportionment formula consisting of one of the following ratios:

Days in Valdez/ 365 OR Miles Traveled in Valdez/Total Miles Traveled

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION AND PETITION FOR USE OF ALTERNATIVE APPORTIONMENT FORMULA UNDER RESOLUTION 00-15, SECTION 2

1. Vessel Name:
Polar Texas (formerly ARCO Texas)

Owner's Name: **ARCO Marine, Inc.**

Owner's Mailing Address:
P.O. Box 100360
Anchorage, Alaska 99510-0360

Address to which correspondence should be mailed:
Leon T. Vance
Faulkner Banfield, P.C.
302 Cold Street
Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 1999: **California, Washington, Alaska**

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 1999: 202

c. Number of days the vessel spent within the City of Valdez in 1999: 49

d. Number of days the vessel was withheld from service for repairs during 1999: 0

3. Request for use of different apportionment formula:

Section 3.12.020 B 1 requires that vessels that have acquired a tax situs elsewhere be assessed on an apportioned basis designed to "allocate to the City the portion of the total market value of the property that fairly reflects its use in the City." The apportionment formula set forth in Section One of Resolution 00-15, as applied to this vessel, does not fairly reflect its use in the City. This vessel was on the high seas, for 163 days during 1999, outside of Valdez and the other ports at which it trades, which time is not reflected in that apportionment formula. When the vessel is on the high seas, it is not used in the City, nor does it use any City services, yet the formula ignores that time, apportioning value to Valdez as if the vessel actually had been present in the City. As applied to this vessel, the formula does not fairly reflect the use of the vessel in the City in violation of Valdez City Code Section 3.12.020 B 1, and violates the Due Process and Commerce Clauses of the United States Constitution. The Owner requests the use of an apportionment formula consisting of one of the following ratios:

Days in Valdez/ 365 OR Miles Traveled in Valdez/Total Miles Traveled

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION AND PETITION FOR USE OF ALTERNATIVE APPORTIONMENT FORMULA UNDER RESOLUTION 00-15, SECTION 2

1. Vessel Name:
Polar Trader (formerly ARCO Trader)

Owner's Name: **ARCO Marine, Inc.**

Owner's Mailing Address:
P.O. Box 100360
Anchorage, Alaska 99510-0360

Address to which correspondence should be mailed:
Leon T. Vance
Faulkner Banfield, P.C.
302 Cold Street
Juneau, Alaska 99801

2. Apportionment Information: (NOTE: ARCO Martine acquired the Trader in May of 1999. The information presented here reflects activity commencing in May 1999.):

a. Jurisdictions in which the vessel had tax situs in 1999: **California, Washington, Alaska, Oregon**

b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 1999: **196**

c. Number of days the vessel spent within the City of Valdez in 1999: **8**

d. Number of days the vessel was withheld from service for repairs during 1999: **9**

3. Request for use of different apportionment formula:

Section 3.12.020 B 1 requires that vessels that have acquired a tax situs elsewhere be assessed on an apportioned basis designed to "allocate to the City the portion of the total market value of the property that fairly reflects its use in the City." The apportionment formula set forth in Section One of Resolution 00-15, as applied to this vessel, does not fairly reflect its use in the City. This vessel was on the high seas, for 169 days during 1999, outside of Valdez and the other ports at which it trades, which time is not reflected in that apportionment formula. When the vessel is on the high seas, it is not used in the City, nor does it use any City services, yet the formula ignores that time, apportioning value to Valdez as if the vessel actually had been present in the City. In addition, the vessel was laid up for 9 days during the year, outside of Valdez. The apportionment formula ignores that time, even though the vessel was not in Valdez and was not utilizing any of its services. As applied to this vessel, the formula does not fairly reflect the use of the vessel in the City in violation of Valdez City Code Section 3.12.020 B 1, and violates the Due Process and Commerce Clauses of the United States Constitution. The Owner requests the use of an apportionment formula consisting of one of the following ratios:

Days in Valdez/ 365 OR Miles Traveled in Valdez/Total Miles Traveled

Tax Year 2001 (filed May 10, 2001)

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Alaska**

   Owner's / Operator's Name: **Polar Tankers, Inc.**

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed: **Leon T. Vance**
   Faulkner Banfield, P.C.
   302 Cold Street
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax sites in 2000: **California, Alaska, Washington**

   b. Number of days the vessel spent in all jurisdictions in which it had tax sites during 2000: **191**

   c. Number of days the vessel spent within the City of Valdez in 2000: **52**

   d. Number of days the vessel was withheld from service for repairs during 2000: **-0-**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2001.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Alaska**

   Owner's / Operator's Name: **Polar Tankers, Inc.**

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   302 Cold Street
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax sites in 2000: **California, Alaska, Washington**

   b. Number of days the vessel spent in all jurisdictions in which it had tax sites during 2000: **194**

   c. Number of days the vessel spent within the City of Valdez in 2000: **47**

   d. Number of days the vessel was withheld from service for repairs during 2000: **-0-**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2001.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Texas**

   Owner's / Operator's Name: **Polar Tankers, Inc.**

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed: **Leon T. Vance**
   Faulkner Banfield, P.C.
   302 Cold Street
   Juneau, Alaska 99801

2. Apportionment Information:
   a. Jurisdictions in which the vessel had tax sites in 2000: **California, Washington, Alaska, Hawaii, Korea**

   b. Number of days the vessel spent in all jurisdictions in which it had tax sites during 2000:**159**

   c. Number of days the vessel spent within the City of Valdez in 2000: **43**

   d. Number of days the vessel was withheld from service for repairs during 2000: **21**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2001.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Trader**

   Owner's / Operator's Name:
   Polar Tankers, Inc.

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed: **Leon T. Vance**
   Faulkner Banfield, P.C.
   302 Cold Street
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax sites in 2000: **California, Washington, Alaska**

   b. Number of days the vessel spent in all jurisdictions in which it had tax sites during 2000: **199**

   c. Number of days the vessel spent within the City of Valdez in 2000: **62**

   d. Number of days the vessel was withheld from service for repairs during 2000: **-0-**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2001.

Tax Year 2002 (filed May 22, 2002)

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Alaska**

   Owner's / Operator's Name:
   Polar Tankers, Inc.

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 2001: **California, Alaska, Washington**

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2001: **186**

   c. Number of days the vessel spent within the City of Valdez in 2001: **48**

   d. Number of days the vessel was withheld from service for repairs during 2001: **-0-**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2002.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar California**

   Owner's / Operator's Name: **Polar Tankers, Inc.**

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   e. Jurisdictions in which the vessel had tax situs in 2001: **California, Washington, Alaska**

   f. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2001: **180**

   g. Number of days the vessel spent within the City of Valdez in 2001: **50**

   h. Number of days the vessel was withheld from service for repairs during 2001: **-0-**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2002.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Texas**

   Owner's / Operator's Name: **Polar Tankers, Inc.**

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   i. Jurisdictions in which the vessel had tax situs in 2001: **California, Alaska, Hawaii**

   j. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2001: **172**

   k. Number of days the vessel spent within the City of Valdez in 2001: **47**

   l. Number of days the vessel was withheld from service for repairs during 2001: **-0-**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2002.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Endeavour**

   Owner's / Operator's Name: **Polar Tankers, Inc.**

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   m. Jurisdictions in which the vessel had tax situs in 2001: **California, Alaska,** Washington, **Louisiana, Panama, Venezuela**

   n. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2001: **145**

   o. Number of days the vessel spent within the City of Valdez in 2001: **26**

   p. Number of days the vessel was withheld from service for repairs during 2001: **-0-**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2002.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Trader**

   Owner's / Operator's Name: **Polar Tankers, Inc.**

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   q. Jurisdictions in which the vessel had tax situs in 2001: **California, Washington, Alaska, Korea**

   r. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2001: **192**

   s. Number of days the vessel spent within the City of Valdez in 2001: **50**

   t. Number of days the vessel was withheld from service for repairs during 2001: **30**

3. Petition for use of different apportionment formula: Owner / Operator intends to file a petition for use of alternate apportionment method. The petition will be filed by May 30, 2002.

Tax Year 2003 (filed April 28, 2003)

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Alaska**

   Owner's / Operator's Name:
   Polar Tankers, Inc.

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 2002: California, Washington, Korea, Alaska

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2002: **226**

   c. Number of days the vessel spent within the City of Valdez in 2002: **40**

   d. Number of days the vessel was withheld from service for repairs during 2002: **28**

3. Petition for use of different apportionment formula: In reliance on a stipulation with the City of Valdez, Owner/Operator will not petition for the use of a different apportionment formula.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar California**

   Owner's / Operator's Name:
   Polar Tankers, Inc.

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 2002: California, Washington, Alaska

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2002: **235**

   c. Number of days the vessel spent within the City of Valdez in 2002: **46**

   d. Number of days the vessel was withheld from service for repairs during 2002: **-0-**

3. Petition for use of different apportionment formula: In reliance on a stipulation with the City of Valdez, Owner/Operator will not petition for the use of a different apportionment formula.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Endeavour**

   Owner's / Operator's Name:
   Polar Tankers, Inc.

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 2002: California, Washington, Alaska

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2002: **274**

   c. Number of days the vessel spent within the City of Valdez in 2002: **52**

   d. Number of days the vessel was withheld from service for repairs during 2002: **-0-**

3. Petition for use of different apportionment formula: In reliance on a stipulation with the City of Valdez, Owner/Operator will not petition for the use of a different apportionment formula.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Resolution**

   Owner's / Operator's Name:
   Polar Tankers, Inc.

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 2002: Argentina, California, Washington, Alaska

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2002: **116**

   c. Number of days the vessel spent within the City of Valdez in 2002: **18**

   d. Number of days the vessel was withheld from service for repairs during 2002: **-0-**

3. Petition for use of different apportionment formula: In reliance on a stipulation with the City of Valdez, Owner/Operator will not petition for the use of a different apportionment formula.

RESPONSE TO REQUEST FOR APPORTIONMENT INFORMATION

1. Vessel Name: **Polar Texas**

   Owner's / Operator's Name:
   Polar Tankers, Inc.

   Owner's / Operator's Mailing Address:
   300 Oceangate, 11th Floor
   Long Beach, CA 90802-4341

   Address to which correspondence should be mailed:
   Leon T. Vance
   Faulkner Banfield, P.C.
   One Sealaska Plaza,
   Suite 202
   Juneau, Alaska 99801

2. Apportionment Information:

   a. Jurisdictions in which the vessel had tax situs in 2002: Hawaii, California, Washington, Alaska

   b. Number of days the vessel spent in all jurisdictions in which it had tax situs during 2002: **197**

   c. Number of days the vessel spent within the City of Valdez in 2002: **40**

   d. Number of days the vessel was withheld from service for repairs during 2002: **-0-**

3. Petition for use of different apportionment formula: In reliance on a stipulation with the City of Valdez, Owner/Operator will not petition for the use of a different apportionment formula.

APPENDIX F

AFFIDAVIT OF DAVE DENGEL

April 19, 2004

David Dengel, being first duly sworn, deposes and says:

1. I am the City Manager for the City of Valdez and I have held that position since 1998. Prior to being City manager, I was the Community Development Director for Valdez beginning in February 1990. In my capacity as City Manager, I was personally involved in the deliberations and public process that led to the enactment of Ordinance No.99-17 on November 15, 1999. This provision amended Chapter 3.12 of the Valdez Municipal Code and imposed a personal property tax on certain described vessels. (Vessel Property Tax). A copy of Ordinance No. 99-17 is attached to this Affidavit as Exhibit A-1. Copies of the Minutes of the City Council meetings of November 1, 1999, and November 15,1999 are attached as Exhibits A-2 and A-3 respectively.

2. A significant portion of the available tax base located in the City of Valdez is oil and gas property taxed by the State of Alaska under AS 43.56 and subsequently shared with the City. These properties include a portion of the Trans-Alaska Pipeline System (TAPS) and the TAPS Marine Terminal. This portion of the City's tax base had been rapidly declining in recent years and was scheduled to continue to do so pursuant to a depreciation formula negotiated between the State of Alaska and the owners of TAPS.

Municipal budgets had decreased by approximately 25% during the 5 years prior to the enactment of the ordinance.

3. The enactment of Ordinance No. 99-17 was part of a long-term effort on the part of the City of Valdez to stabilize municipal revenues. In fact, an earlier version of the Vessel Property Tax had been enacted in 1997. A copy of Ordinance No. 96-35 is attached to this Affidavit as Exhibit A-4. This enactment occurred after, at least, one year of unsuccessful negotiations with representatives of Alyeska Pipeline Service Company. Copies of relevant excerpts of the Minutes of the City Council meetings of December 2, 1996, December 16, 1996 and March 3, 1997 are attached to this Affidavit as Exhibits A-5, A-6 and A-7 respectively. This tax was subsequently repealed in May 1997. A copy of relevant excerpts of the Minutes of the City Council meeting of May 5, 1997 is attached to this Affidavit as Exhibit A-8. This was done at the urging of the TAPS owners and shippers, after protestations by the Alaska oil and gas industry generally, and at the personal request of Governor Tony Knowles. These parties encouraged the City of Valdez to resume discussions with the vessel owners and their corporate parents concerning the possibility of certain annual payments in lieu of tax. This was an approach that had been worked out successfully between the industry and the North Slope Borough. The City of Valdez agreed to this process but, after two years of inconclusive and intermittent discussions, this approach was deemed unproductive by the City. See, copy of Mayor Cobb's letter of Sept. 22, 1999 which is attached to Affidavit as Exhibit A-9.

4. Ordinance 99-17, enacted by the City in late 1999 exempts from taxation certain classes of vessels over 95 feet: foreign-documented vessels, commercial fishing vessels and vessels docking "exclusively at the Valdez Container Terminal where [they are] subject to municipal dockage charges". The scope of the exemptions was narrow and, at the time, included only a few tenders that served a local processor and cruise ships. These industries were thought to contribute to the City economy in other ways. In addition, taxation of cruise ships, to the extent that they are foreign-flagged vessels, raised constitutional foreign commerce clause concerns that the City chose to avoid.

The exemptions have also recently been applied to other vessels engaged in the marine transportation of oil and related activities. Crowley Marine Services, who is contracted by Atyeska to perform required oil spill prevention and response, docks its *Barge 450-1* at the Valdez City Dock and pays municipal docking fees. Also, Alyeska, through its oil spill prevention and response entity, Prince William Sound Oil Spill Response Corporation also docks its Barge *Mineral Creek* at the Valdez City Dock where it pays docking fees. Therefore, these barges have been exempted from taxation under Ordinance 99-17.

5. As City Manager, I was responsible for implementing Ordinance No. 99-17 for the year 2000. The City had to make sure that all taxable vessels were identified, added to the City's assessment roll, and both properly valued and timely assessed. In December, I sent a letter to the owners or operators of the vessels that we identified as subject to the new tax. The letter provided notice of the new tax, at-

tached a copy of the ordinance, and made certain requests for information that was relevant to the valuation and assessment process. Copies of the letters (without attachments) sent to SeaRiver Maritime, Inc., and Polar Tankers, Inc., (then Arco Marine Inc), the remaining plaintiffs in this litigation (hereinafter collectively "Remaining Plaintiffs") are attached to this Affidavit as Exhibits A-10 (Sea River Maritime, Inc.) and A-11 (Arco Marine, now Plaintiff Polar Tankers, Inc.).

6. In addition to Mike Renfro, the City's contract assessor, the City retained Sidney Levine of Shipping Intelligence, Inc. to assist in the valuation of the vessels that were subject to the new tax. After reviewing the information provided by the shippers, and after consultation with the City's valuation experts, the assessor applied a replacement cost less depreciation methodology. Notices of assessment declaring the full unapportioned value of the vessels were issued and sent to the taxpayers by my letter dated March 13, 2000. A copy of this letter is attached to this Affidavit as Exhibit A-13.

7. On April 5, 2000, the Remaining Plaintiffs challenged the unapportioned tax valuations by submitting the City of Valdez Administrative Review and Appeal Form with respect to each vessel assessed. The Remaining Plaintiffs also argued that these revised valuations should be apportioned to Valdez through the use of an apportionment formula based on time spent in Valdez divided by 365 days. Copies of these protests (with attachments limited to the vessels of the Remaining Plaintiffs) are attached as Exhibit A-14.

8. In meetings held in early May 2000 between the city assessor and the representatives of

the vessel owners, the disputes over the total unapportioned valuation of the vessels were resolved with one exception – the valuation of the *SeaRiver Long Beach*. With respect to the vessels operated by Arco Marine. Inc (now Polar Tankers, Inc.), all 6 vessels were the subject of agreed adjustments. With respect to the vessels operated by SeaRiver Maritime, Inc., adjusted values were agreed upon for 4 vessels and the valuation of the *SeaRiver Long Beach* remained unresolved. On May 16, 2000, the City's Board of Equalization heard the appeal concerning the *SeaRiver Long Beach* and, after due deliberation, upheld the assessor's valuation. This matter was then appealed to the Superior Court. That court issued a decision in *SeaRiver Maritime, Inc v. City of Valdez*, Ak. Super. Ct. 3AN-00-3686C1, dated Aug. 14, 2001, requiring the City to make an adjustment in the taxpayer's favor. Subsequently, the parties have reached an agreed upon adjusted value for the *SeaRiver Long Beach* for the 2000 tax year.

9. Ordinance No. 99-17 required that the assessor develop an apportionment formula that would properly allocate to the City of Valdez an appropriate portion full value of any vessel that had established tax situs elsewhere in intrastate, interstate or foreign commerce. See VMC 3.12.20 (B), Section 1 of Ordinance No. 99-17. This proposed formula was developed with the assistance of the City's assessor Mike Renfro, the city attorney, and other outside consultants. It was determined that the most appropriate method would be a days-in-port ratio: days in port in Valdez divided by days in port everywhere (excluding periods when a vessel is tied up due to strikes or vessel repairs). As required by the ordinance, the formula was presented to the City Council for its approval.

10. On May 1, 2000, the City Council adopted Resolution No. 00-15 which approved the "days in port" formula. A copy of Resolution No. 00-15 is attached to this Affidavit as Exhibit A-15. A copy of the Minutes of the May 1, 2000, meeting of the City Council is attached to this Affidavit as Exhibit A-16. The general mechanics of the port-day formula and the general operations of the vessels subject to the tax were well understood by the assessor and myself at the time I presented the resolution to the City Council. Section 2 of the resolution also allowed taxpayers to petition for the use of an alternative formula if the days in port approach "did not reasonably represent the portion of the total value of the vessel that should be apportioned to the taxing situs of Valdez." This section was intended to deal with unusual or atypical fact patterns that resulted in unfairness, and not to allow wholesale avoidance of the general rule set forth in Section 1 of the resolution.

11. After the passage of Resolution No. 00-15, the City requested additional information needed to apply the port-day formula to the various vessels. Copies of my letters of May 17, 2000 sent to the Remaining Plaintiffs are attached to this Affidavit as Exhibit A-17. On or about May 30, 2000, the Remaining Plaintiffs filed Responses to Request for Apportionment Information and Petitions for Use of Alternative Apportionment Formula under Resolution No. 00-15, Section 2. The Remaining Plaintiffs argued that the City's days-in-port method was unfair and violative of the U.S. constitution. They proposed two alternative ratios: 1) a days in Valdez divided by 365; or 2) miles traveled in Valdez divided by total miles traveled. Copies of the relevant Responses/Petitions are attached to this Affidavit as Exhibit A-18.

12. In early June 2000, final revised assessments were prepared which applied the port-day formula to the vessel valuations agreed upon with the vessels' representatives or, in the case of the *SeaRiver Long Beach*, to the valuation approved by the Board of Equalization. A summary of the revised assessments and total taxes to be paid for 2000 prepared during this period is attached to this Affidavit as Exhibit A-19.

13. On June 9, 2000, I issued decisions denying the Remaining Plaintiffs' Petitions for Use of Alternative Apportionment Under Resolution 00-15 on behalf of the City Administration. Copies of the relevant decisions are Attached to this Affidavit as Exhibit A-20.

14. On June 16, 2000, the Remaining Plaintiffs filed notices of appeal to the City Council of my June 9, 2000 decisions. Copies of these Notices are attached to this Affidavit as Exhibit A-21. The Remaining Plaintiffs filed a brief (Appellants' Position) before the City Council on July 6, 2000. A copy of this memorandum is affidavit as Exhibit A-22.

15. On July 11, 2000, a hearing on the shippers' appeal was held before the Valdez City Council. A presentation was made by the attorney for the shippers. I represented the City administration. In response to questions from a council member, Mr. Leon Vance, counsel for the protesting shippers, conceded that none of these vessels were in fact taxed by any other taxing jurisdiction. After due deliberation, the City Council upheld the position of the City Administration and denied the shippers' appeal. A copy of the minutes of that meeting is attached to this affidavit as Exhibit A-23.

16. At one time during this process, the City identified 31 vessels as subject to the tax. A copy of this list is attached as Exhibit A-24. Three vessels were dropped from the roll as a result of the review process. The *Chevron Washington* was dropped from the roll because it was determined that it had been taken out of the Alaska service several years previously. Two tugs owned by Western Tow Boat were dropped because it was determined that these vessels were less than the prescribed 95 feet in length.

17. Ultimately, for the year 2000, the Vessel Property Tax was assessed on 28 vessels. Of the 28 vessels, 24 were oil tankers, and 22 of these were operated by Alaska Tanker Company, LLC, SeaRiver Maritime, Inc. and Polar Tankers, Inc. Eleven tankers were operated by Alaska Tanker Company, LLC, six by Polar Tankers, Inc and five by SeaRiver Maritime, Inc. The four other vessels consisted of three tugs and a passenger cruise vessel. The City found that all the vessels except the latter had established tax situs outside of Valdez requiring application of the apportionment formula. The total tax paid for the year 2000 under the Vessel Property Tax is $1,899,709.39 which constitutes about 10.1% of the total tax revenues received by the City of Valdez for that year. The total amount paid under protest for the year 2000 by Alaska Tanker Company, LLC was $862,716.38, by Polar Tanker, Inc. was $440,221.24, and by SeaRiver Maritime, Inc. was $529,670.60.

18. Remaining Plaintiffs have also paid the Vessel Property Tax to the City under protest for the years 2001 and 2002. Four tugs have been added to the City rolls for 2001 and 2002: *The Cavalier, The Sea Viking, The Seneca and The Warrior* are all owned by Crowley Marine Services.

19. The vessels assessed by the City in 2000 are not subject to the AS 43.56 property tax and until the year 2000, were not taxed by either the State of Alaska or the City of Valdez. There are also certain large escort vessels that the City contends are subject to AS 43.56 that should have been added to the State rolls. These SERVS vessels are engaged in the business of escorting oil tankers out of the port through municipal and state waters. They provide an extra layer of safety and environmental protection designed to help avoid future catastrophic oil spills, such as the 1989 *Exxon Valdez* disaster.

20. In October 1974, the people of Valdez approved a proposition to authorize the issuance of up to $2 billion in revenue bonds to fund the acquisition and construction of the marine terminal and related facilities, e.g. tanks and docks, for the Trans-Alaska Pipeline System. A copy of the Ballot Proposition is attached to this affidavit as Exhibit A-25. Ordinances enabling these bonds were subsequently adopted. See Ordinance Nos. 7525 and 7532. Subsequently, $1.3 billion in revenue bonds were issued by the City of Valdez for this purpose. Since that time, the City has cooperated with the TAPS Owners to secure the refinancing of these obligations.

Further your affiant sayeth naught.

Dated this 19th day of April, 2004.

APPENDIX G

VALDEZ CITY COUNCIL MEETING MINUTES

November 1, 1999

XIII. ORDINANCES

* * *

2. #99-17 - Amending Chapter 3.12 of the Valdez City Code to Enact a Personal Property Tax on Vessels. First Reading.

Council member Shirrell and Council member Nielsen declared a conflict of interest. Mr. Walker pointed out there was a thorough review of the conflict of interest provisions in the City Code and State Law. It is his opinion those council members whose spouses are employed by Alyeska, do not have a conflict of interest and, although it is appropriate to acknowledge their relationship with Alyeska, they do not have a conflict.

Council member Shirrell pointed out that a couple of years prior, it was determined that he did, in fact, have a conflict of interest and was based on the contract relationship with Alyeska and the vessels affected. Council member Nielsen felt Council member Shirrell was placed in a unique position at this point, and has been eliminated from any discussions that have taken place in the past, and yet has been asked to make his vote. He didn't feel this was a fair situation to place Council member Shirrell in.

Council consensus was to grant their request to abstain from this agenda item.

MOTION: Council member Cottle moved, seconded by Council member Moore, to approve Ordinance #99-17. First Reading.

Mr. Hisey, Senior Vice President, Business Unit, APSC, addressed the Council regarding the proposed ordinance. He voiced opposition to this proposed ordinance. He said that through his work experience, to be a successful business leader, you need to plan for the long term. A success business plan must take into account both short and long term objectives, and consider the multitude of ramifications of its actions over time. Additionally, it must address both sides of the cost and revenue equation. He urged the Council to take the same approach in running the City of Valdez. This City's fiscal problems are long term. Any new tax is only one piece of a much larger puzzle. He felt that instituting a new tax now is unnecessary and a local tax on tankers and larger vessels is bad public policy for four basic reasons. The tax proposed is progressive. The tanker tax will lower the wellhead value of every barrel of North Slope crude produced, adding to the already high transportation costs. The tax will make Alaska less competitive compared to other countries and projects. Thirdly, this type of change in tax structure causes companies to question whether or not there is a stable and predictable fiscal plan. Fourthly, if local government can change oil and gas taxes whenever its needs change, this will add to substantial risks and uncertainty of business. Mr. Hisey again urged Council to consider the long term and to work to develop a plan that takes into account all of your options and all of your long-term impacts and not just your short-term gains.

Mr. Kurt Hallier, speaking on behalf of ARCO Alaska, expressed their opposition to the proposed ordinance. It is the opinion of ARCO that the issues have not changed and neither have their concerns about the tanker tax. This tax remains a radical departure from the long held State policy of determining oil and taxation at State level. Stable or even increased North Slope oil production is key to the continued prosperity for all Alaskans. He felt local and State governments and the oil industry should work together to find ways to bring more oil through the pipeline, not adding new costs to an already expensive transportation system.

Ms. Jean Stewart, Valdez Chamber of Commerce, read into the record a resolution approved by their board to the Council stating their opposition to this ordinance.

Mr. Chuck Colson, Manager of APSC-BP/AMOCO's Transportation Business Unit, stated they understood the City's desire to stabilize its tax base and revenue stream. He pointed out that over the past several years, they've had to make hard decisions and taken difficult steps to reduce the cost and scope of their operation. He felt the City and owner companies worked together to reduce the rate of decline and the rate of decline would have been much greater if the agreement hadn't been made. He encouraged increased dialogue regarding this or any other issue of mutual concern. He felt Alaska must have a unified tax policy to ensure that all Alaskans benefit from the production of North Slope oil and gas. Mr. Colson said this ordinance was bad public policy.

Mr. Joe Prax, Valdez business owner, said this was a puzzling way to get business for Valdez and he

opposed this ordinance. He agreed with Mr. Colson in that Alaska may not be an area in which companies will want to invest. Mr. Prax felt there were communities in Alaska, such as Nikiski, who would offer tax breaks, rather than create a tax burden, to entice industry. Businesses look at the economics of the business. He reminded Council there are many towns who would be happy to have Alyeska, without receiving additional taxes. He felt this gives a negative message to the companies.

Council member Williams pointed out that TSM was bad public policy and it took some of the taxing rights that Nikiski has, which Valdez does not. TSM was a back room deal with the Legislatures and the oil companies, with Valdez excluded in negotiations. Part of the ramifications of this agreement is why Valdez has a 20 mil rate. Oil and gas should be taxed at the State level, however, the City should tax the facilities in Valdez. This ordinance will help level things out and should help to reopen the negotiations between the oil companies and the City.

Council member Moore said this was not a very easy situation and she felt obligated to consider all of the citizens of Valdez. She recalled the earlier negotiations and had hoped for a common ground, but issues and playing fields changed. She said she didn't want to see the declining value that the City has. Residential taxes will not carry the burden when oil property values are decreased as projected. Ms. Moore would be willing to stop this process, as long as those people come to the table in a manner that is equal-equal.

Council member Stephens agreed for the most part with Council member Moore. She pointed out Valdez has changed as a community, with a growth

in population and infrastructure. She felt that as the tax base decreases, something has to make up the difference. She compared the recent renovations at Alyeska and with any local small business and how those improvements were assessed and taxed. The City is trying to maintain a standard of living. With significant tax losses, the needs of the community will lose as well.

Council member Cottle said the only comments he received regarding this was from an industry employee stating their opposition to this.

Mayor Dave Cobb pointed out Mr. Prax was the only person who spoke to the affect this would have on Valdez as a community. In 1990 there was a 134% increase in personal, non-oil related, property taxes. There has been an oil property devaluation of 45% and a reduction in the General Fund Budget for the City of 25%. There was also a 17.5% reduction in the number of employees for the City. He felt the City had done its share. He recalled the discussions of 1997 in which the industry said the City needed self-help. The reductions are the examples of the City's self-help. He wrote a letter to the companies inviting their participation in a negotiation/discussion meeting, to which he has not received a response.

VOTE ON THE MOTION: 5 yeas, 2 abstain (Shirrell and Nielsen). Motion carried.

November 15, 1999

XII. ORDINANCES

* * *

2. Ordinance No. 99-17, Amending Chapter 3.12 of the Valdez Municipal Code to Enact a Personal Property Tax on Vessels. Second Reading. Adoption.

MOTION: Council member Williams moved, seconded by Council member Cottle, to approve Ordinance #99-17. Second Reading and Adoption.

Council member Nielsen declared a conflict of interest, as did Council member Shirrell. Council concurred that Council member Nielsen did have a conflict of interest and would abstain from voting. After research and discussion, it was determined Council member Shirrell would not be excused from voting on this item.

Wayne Lewoczki, Exxon representative, addressed the Council and expressed his opposition to the ordinance. He gave a brief overview of the past history of agreements with the State, oil industry, and local government. He pointed out there was additional property provided to the City's taxable base. He urged Council to work with the oil industry to develop alternatives, rather than pass this ordinance. He asked Council to look at the long-term effect on the City.

Mayor Cobb informed Mr. Lewoczki the previous agreement was a short-term agreement and there haven't been any attempts to move ahead with any long term solutions. This community is faced with substantial tax revenue losses over the next year, and additional losses of State revenue. He agreed there was a need for more discussions between the oil industry and the City. The City has strived to cut costs and employees over the past three years. Mr. Lewoczki pointed out there is a window over the next

year to work together to resolve the TAPS valuation issues and concerns.

Council member Shirrell expressed his displeasure at having to vote on this issue due to his employment with the oil industry and his role as a City Council member. He agreed the City couldn't continue to suffer the losses of tax revenue without significantly impacting the quality of this community's life. He didn't believe the proposed tax was the answer, but through the passage of this ordinance, the parties would come together to work on alternatives.

Council member Moore acknowledged the public's input through their letters to Council. She said when she makes improvements to her personal property, her assessment increases. All properties should be treated the same, when there have been improvements made, thus increasing the property value. She felt government should be responsible to all of the citizens of Valdez.

Mr. Joe Prax, local business owner, felt this was a business tactic and was the wrong approach. With the increase in taxes, Alyeska will be forced to layoff employees to find the additional funds or an earlier shut down of the system. He pointed out the inequities in services received for the portion of taxes they pay. Mr. Prax said the terminal has depreciated in value over the past twenty years. He felt the City should reevaluate its needs and spend funds wisely. Mr. Prax said that in time, the City would want a sales tax, and then a personal property tax.

VOTE ON THE MOTION: 5 yeas, 1 abstain (Nielsen), 1 absent (Stephens). Motion carried.

XIII. RESOLUTIONS

* * *

1. Resolution No. 00-15, Establishing a Methodology for Apportioning the Personal Property Tax on Vessels Over 95 Feet in Length

MOTION: Council member Stephens moved, seconded by Council member Cottle, to approve Resolution No. 00-15.

Council member Nielsen declared a conflict of interest. There was no objection by Council.

Mr. Walker, City Attorney, explained the resolution. Mr. Walker said the first meeting with the shippers regarding the apportionment was held in December of last year. Mr. Walker and Mr. Dengel met with the shippers in his office in Anchorage to explain the process and how the ordinance worked. At that time the shippers provided input and suggestions, some of which were incorporated into this resolution, and some that were not. Since then, there have been follow-up discussions with various representatives of the shippers regarding various formulas. There have been discussions regarding a formula that would be the assessed value times the percentage of the ration of the number of days in Valdez. This resolution was a compromise. Mr. Walker said he had spoke with taxing entities in Louisiana, Tennessee and Arkansas which use a miles in jurisdiction as a ratio in comparison to total miles in the system for tugs and barges that ply the waters of Mississippi in their taxing jurisdiction. Ultimately he looked to the Alaska Statutes, which address appor-

tionment of income from companies that come into the state to make their income. This resolution mirrors the Alaska Statute.

Section 1, paragraph A, talks about the formula as 100 percent of the assessed value, times the ratio of days spent in Valdez, divided by the total number of days spent in all ports, including Valdez where the vessel has acquired situs for taxation. There have been questions regarding the tax situs. This is included in the resolution as a result of the potential of a vessel going through another port passing through multiple jurisdictions by water but it has no situs. This is to make it so that it is "apples to apples". The commerce takes place in Port Valdez as well as the commerce that takes place in the other end where they are in the discharge mode. There has been confusion regarding if Valdez receives 100 percent of the value, less what they pay taxes elsewhere. Mr. Walker said this is not how the resolution is worded. Section B talks about the way the tax is determined based upon the number of days spent in the Port during the year prior to the tax. This will not always be exact, but will even up in subsequent years. Paragraph C talks about the days in the Port and does not include periods that the vessel is tied up due to strikes or held up for service or repairs. The intent is to exclude the time spent at the container terminal for repairs, and likewise if the vessel is tied up in other jurisdictions for repairs. Vessels are being taxed on income, if the vessel is in Port for repair it is not earning income for this period of time. Paragraph D speaks to days in the Port.

Section 2 is a provision that stems from previous meetings from the shippers. The assessor needs to have the flexibility to look at a particular circum-

stance for a vessel that may not fit the standard methodology. It creates a way to set aside the standard methodology in Section 1 and apply it to a particular vessel.

Council member Shirrell asked if the days in Port apply to all Ports and was not specific to Valdez. Mr. Walker said this was correct.

Council member Williams asked if there was an appeal provision if they cannot reach an agreement with the assessor. Mr. Walker said the appeal process would be the Board of Equalization process.

Mr. Leon Vance said this resolution would effect several of his clients who include Alaska Tanker Company, ARCO Marine Inc., Chevron Shipping and Sea River Maritime. Mr. Vance said the vessel owners and operators believe that the ordinance imposing the property tax on their vessels is not constitutional and that the assessments overstate the value of the vessels. The failure to apportion properly is one of the constitutional problems with the ordinance. The failure to apportion properly effects the valuation issues, but is not the only valuation issue. Mr. Vance said he was here to provide guidance on the apportion issue.

Mr. Vance said with respect to apportionment the Council is dealing with an issue of national significance. The role of marine transportation and interstate commerce and the effect of local taxation on the entities involved in activities in more than one taxing jurisdiction, are subjects that have received a great deal of attention in the United States Constitution and the cases interpreting it. Under both the due process clause and the commerce clause of the constitution, apportionment of the tax base among

the jurisdictions with a claim to the tax base is required. The failure to apportion or to apportion improperly results in the taxation of extra territorial values and improperly interferes with interstate commerce: The goal of any apportionment method should be to allow the jurisdiction to tax its fair share of the profit, but no more. To satisfy the due process requirements, an apportionment method must meet several tests. The test pertinent here is; the value resulting from the apportionment must be fairly related to the level of activity of the property within the jurisdiction. It must not reflect activity outside of the jurisdiction. The commerce clause also requires fair apportionment, and in addition requires that the measure of the tax must be fairly related to the services provided by the jurisdiction. An unapportioned or malapportioned value is a constitutionally unsound measure of value. A tax based on that measure is not fairly related to the services provided by the jurisdiction. In their assessment appeals the owners have apportioned on a basis that meets the constitutional requirements. Their proposal is time in Valdez during the proceeding year over 365 days. The resulting percentage is then applied to a reasonable approximation of value. Mr. Vance said that this method is constitutionally sound. The apportionment value is reasonably related to the actual level of activity in Valdez. Because the time the vessel is in Valdez is the only time it has any contact with the City. When a vessel is outside of the jurisdiction, its activities are not subject to the tax. The resulting apportionment value also yields a measure fairly related to the services provided because a vessel has an opportunity to use the city services or benefit from their availability only when it is in Valdez. When a vessel is not in Valdez, irrespective of if it is in an-

other port or on the high seas, the City does not provide any direct services to-the vessel, nor does the vessel benefit from the services indirectly. The apportionment method described or the U.S. Supreme Court and the Alaska Supreme Court in similar situations have approved an equivalent, such as the ration of miles traveled in a jurisdiction, over total miles traveled. in a case arising in Alaska, North Slope Borough vs. Puget Sound Tug and Barge, the apportionment method itself was not directly at issue. However, the Alaska Supreme Court upheld the assessment of a uniform property tax on certain barges based on the time the barges spent in the jurisdiction during the course of the year. In reaching its decision, the court relied on a 1949 U.S. Supreme Court case in which barges and tow boats were taxed by Louisiana on an apportion basis. The apportionment basis was the ratio of miles traveled in Louisiana, over the total number of miles traveled. The U.S. Supreme Court approved that method because that apportionment was fairly related to activity within the state. The current Louisiana Statute still uses this mileage ratio for vessels. Other jurisdictions imposing a uniform ad valorem property tax on property that includes vessels also rely on ratios of mileage within the jurisdiction over total mileage, or time within the jurisdiction over the whole year, as a basis for apportionment. Mr. Vance referred to Texas Statute Section 21.031, which taxes cargo transportation vessels on an apportion basis using an apportionment method of miles in Texas, over total miles of operation. There are other vessels that are also subject to the tax, special purpose vessels which are taxed on an apportion basis, where the apportionment is based on the days physically present in the State over a period of 365 days. Mr. Vance said there

is also a Washington statute, Section 84. 40. 036, concerning vessels that are subject to apportionment. That statute bases the apportionment on the number of days physically present in. Washington over the coarse of the year. In that situation, no value is apportioned to the. state of Washington unless the vessel spends more than 120 days.

An apportionment method based on the fraction of the year the vessel is present in Valdez, or one based on the apportionment of total miles traveled will reflect the proportional level of activity in Valdez. The City of Valdez has not proposed either of those apportionment methods. Mr. Vance said the method proposed in this resolution fail to satisfy the constitutional requirements that he has discussed. The basis for taxation of the vessels at all, is the presence in the jurisdiction. The vessels use, or potential to benefit from services is what entitles the City to ask for payment of taxes in return. If a vessel is not in the jurisdiction, it does not use or benefit from city services. Mr. Vance said that under this resolution the tax is based on ignoring travel time outside of Valdez it is not reasonably related to the vessel's activity in the jurisdiction, and improperly taxes extra-territorial time on the high seas, yet the proposed method ignores that time. Measuring the tax by an artificially high value. A tax based on an apportionment under the proposed resolution taxes extra-territorial values in violation of the due process clause and improperly interferes with interstate commerce in violation of the commerce clause. Mr. Vance said the tax the city is proposing is not an income tax. It is an advalorum property tax. He said the statues he has cited from other jurisdictions involve property taxes. The statue to which Mr. Walker refers is an income tax statute. Mr. Vance said the

two types of taxes do not operate in the same manner. Mr. Vance said that whether the apportionment method is constitutional would be judged by reference to the property tax cases: Mr. Vance said the proposed apportionment method is not reasonable and deviates from what has been done in other jurisdictions and above all is not constitutional.

Mr. Tim Plummer, Tesoro Maritime Company, said this issue was very important to Tesoro Maritime as it relates to their business in Alaska. Mr. Plummer said this is a very important piece of legislation for Tesoro. It is important in a way that may be different than some of the other companies that ship crude oil from Valdez as Tesoro also has a refinery in Cook Inlet. Their shipping is a large part of their expense and that requirement, in how they ship their crude oil, is different from the companies they compete with in Alaska. Mr. Plummer said he wanted to point out the views of Tesoro relative to this resolution.

Mr. Gene Burden, Tesoro Maritime Company, said the council was provided with very clear guidelines for apportionment methodology in the ordinance that was adopted by the City Council. Mr. Burden said the final product approved by the Council should clearly reflect the use of the personal property within the city as the ordinance directs. Mr. Burden said he believes that the apportionment approach has to be fairly related to the services provided by the City and reflect the time the vessel is in the city. Mr. Burden said that Tesoro is a major supplier of refined product in the city and supplies over 90% of the gasoline and home heating oil. Mr. Burden said that Tesoro also supports many community activities. Mr. Burden said the results of the delib-

erations by council would have a direct impact on their operation. Mr. Burden asked that Section C is removed from the resolution. Mr. Burden said the services provided by the city to the vessels need to be defined. He said that Tesoro is requesting that the city adopt an apportionment method that is based on the number of days the vessel is in Valdez, divided by 365.

Council member Cottle pointed out that Section 2 of the resolution provides an appeal process if a vessel is out of service for 21 days. Mr. Burden said that this would provide a vehicle that would need to be flushed out with experience.

Mr. Walker said Section 2 would not be a vehicle for appeal.

Council member Moore asked for the definition of the term "situs". Mr. Walker said it means that the vessel is engaged in a commercial activity of doing business in a jurisdiction, rather than just passing through the waters of a jurisdiction Council member Moore said that if the vessel were in Port for repair they would not be considered "in situs". Mr. Walker said this would be an acceptable exemption for situs. Under the formula proposed, those days would not be counted. Council member Shirrell asked for clarification, he asked if days in port for repair did or did not constitute situs. Mr. Walker said they possibly could. He said it also appears to be an acceptable exemption if the Council should choose. Council member Williams said that what he understood situs to be was a mechanism to determine when the vessel is actually in port. If it could be taxed, it would be considered in port. If the vessel was anchored up, it could also be determined to be in port, such as Knowles Head. Council member Wil-

liams said he believed this section was included to give definition between when the vessel is in port and when it is plying through the waters of another jurisdiction. Mr. Walker said this was correct.

Mr. Burden said that Section A should be amended to delete "and all ports".

Mr. Lynn Chrystal spoke from the audience. Mr. Chrystal said he wished to speak about fairness and right and wrong. Mr. Chrystal said this issue does not stand-alone. This issue is a culmination of many things, which began in 1985. Mr. Chrystal said a secret deal was negotiated between the State of Alaska and the oil industry, which put the spike into the taxation ability of the City of Valdez Mr. Chrystal said that he believed that the State legislature at that time knew that this was wrong and would hurt the City of Valdez down the road. Mr. Chrystal said the 1985 deal that was struck was unfair. He pointed out that the North Slope Borough has had a payment in lieu of taxes deal for many, many years. Valdez did not get a deal for payment in lieu of taxes. Mr. Chrystal said that over the years the city has been patronized and patted on the head by the Governor and the oil industry group as we have tried to negotiate some type of fair settlement. Mr. Chrystal said that fifteen years later the residents are paying an astronomical amount in taxes, while big oil has received a break year after year. Mr. Chrystal said there is nothing wrong with the oil industry fighting for what they think they deserve, but the council needs to fight for the community. He said it was time to take a stand for the taxpayers of Valdez and the citizens who are struggling. He asked how much longer the City could go on with valuation of the oil terminal falling at the present rate. He pointed out

that the Alyeska Marine Terminal spent 100 million dollars on the Vapor Recovery System and the property evaluation went down. He compared this to a company coming to Valdez, adding 400 quarter of million-dollar homes, and paying no tax.

VOTE ON THE MOTION: 6 yeas, 1 abstain (Nielsen). Motion carried.

APPENDIX H

AFFIDAVIT OF NANCY PETERSON

NANCY PETERSON, being first sworn upon oath, deposes and states as follows:

Affiant's Background

1. I am the Assistant City Manager. I am also the Valdez Port Director and Director of the Valdez Parks and Recreation Department. I make this Affidavit upon my own information and belief in support of Valdez's Motion for Summary Judgment.

2. I have worked for the City of Valdez for fifteen .years in various capacities. Originally, I was hired in 1988 to be the Director of the Valdez Parks and Recreation Department. In addition, in 2000, I was appointed as the Port Director, responsible for the management and oversight of the City's Port facilities, which include the Valdez Container Terminal Dock and the Old City Dock, as well as the harbor and airport terminal building. In 2001, in addition to my other duties, I assumed the position of Assistant City Manager. Throughout my fifteen years' employment with the City, I have been assigned numerous special projects in addition to my regular duties.

3. As Port Director, I directly supervise the harbormaster and the Port Department employees and establish policies and procedures for the port and harbor facilities. Also, I am responsible for the enforcement of port and harbor rules. I therefore, have personal knowledge about activities relating to the Valdez Harbor and Port facilities.

4. The City of Valdez owns and operates the Valdez Airport Terminal Building. I am responsible for the management of the building, including management of lease agreements, and therefore, have personal knowledge relating to activities at the Airport Terminal.

The City of Valdez

5. Valdez is a home-rule city. The City's year-round population of 4,500 is concentrated in an area which sits on the north side of a body of water known as "Port Valdez," near the mouth of Mineral Creek. However, the City limits encompass all the land surrounding Port Valdez, and stretch westward from the Keystone Canyon on the Lowe River through the Valdez Narrows to a point west of Jack Bay. See attached Ex. B-1. Within the Valdez City limits are eight vessel-docking facilities, three of which are owned by the City: the Valdez Small Boat Harbor, the Valdez Container Terminal ("the Container Terminal") and the Old City Dock. These docking facilities are located near the town center, on the north side of Port Valdez. The five privately-owned docking facilities are the State Ferry Dock, Petro-Star Dock, Coast Guard Dock, SERVS Dock and the Valdez Marine Terminal ("the Alyeska Terminal"). All the privately-owned docks, except that of the Alyeska Terminal are located on the north side of Port Valdez. The Alyeska Terminal and tanker berths are owned and operated by a consortium of oil companies, and are located across Port Valdez from the town of Valdez, on the southern shore of Port Valdez. The Alyeska Terminal is within the City limits.

6. The SERVS (Ship Escort Response Vessel System) facility was constructed after the 1989 Exxon Valdez oil spill. The facility provides offices

and docking facilities in Valdez for the tugs and support vessels that are fully dedicated to the tanker escort program.

7. Port Valdez is a body of water with depths of up to 800 feet, and is the northernmost year-round ice-free port in North America. This makes it possible for the large oil tankers to maneuver to the Alyeska Terminal berths at all times, regardless of the tide. The availability of Port Valdez as a place to load crude oil is a benefit to the shipping companies in that they do not lose time waiting in deeper waters for the tide to come in so that the water is deep enough at and near the Alyeska Terminal to dock safely.

Benefits and Services Available to the Shippers

8. The City of Valdez both provides services directly and makes them available to the crude oil shippers. Valdez owns the Container Terminal, which is a 700-foot concrete floating dock. City services available at this dock include water, lights, telephone connection and garbage disposal. The Container Terminal serves as an alternate, large docking facility. The crude oil shippers use the Container Terminal to perform repairs on their vessels.

9. In the early 1990s, oil tanker "traffic lanes" were established in Prince William Sound and into Port Valdez. Ex. B-2. These lanes are wholly dedicated to tanker traffic; transiting crude oil tankers have unconditional priority over all other vessel traffic. The City, therefore, has had to notify sports and commercial fishermen who use Port Valdez and the nearby waters of Prince William Sound to avoid these designated areas.

10. As a result of the terrorist attack on the United States on September 11, 2001, the security zone around the Alyeska Terminal in Port Valdez has been expanded. The map, attached as Ex. B-3, shows the existing security zone, which was approximately 200 yards around the Alyeska Terminal. The new Tanker Vessel Moving Security Zone is 200 yards around any tank vessel in Prince William Sound. The City has been required to provide educational notices relating to the increased security in Port Valdez.

11. The United States Coast Guard is a significant presence in Valdez. The Coast Guard owns several buildings located in the town of Valdez. Throughout the late 1990s, there were approximately 35 Coast Guard employees stationed in Valdez. Since September 11, 2001, because of the risk to the oil tankers and the Alyeska Terminal, the number of Coast Guard employees has more than doubled. These employees and their families use the full range of City services. Yet, the Coast Guard facility itself is tax exempt.

12. Recently, the Coast Guard contracted with the City to install 'infrared' security cameras in two locations within the City for the purpose of providing surveillance and security for the oil tankers and the Alyeska Terminal. One of the cameras is installed in the Valdez Police Dispatch area.

13. The City's support of security for the oil storage and transportation facilities and vessels located in Valdez was evident when a national "Code Orange" security alert was imposed in December 2003. The Port of Valdez was the only port in the United States closed temporarily as a result of the alert. In support of the increased security measures,

Valdez City police worked 12-hour shifts, and the City was required to hold a briefing to quell residents' fears.

14. According to the 1998 Alyeska Terminal Contingency Plan, the City of Valdez police dispatch is notified of all oil spills of more than 10 gallons on land, or more than 50 gallons in water, or any spills involving fire and injury. Valdez police dispatch then notifies the City and other parties or organizations included in the City's contingency plan.

Valdez services which are made available in the event of an oil spill include not only the police, but also, the fire department and emergency medical resources, including the hospital. While not specifically identified as team members on Alyeska's Incident Command System for emergency operations, the City's Senior Management Team (City Manager and Department Heads) attend and participate in many of the oil spill drills. Last year, our police chief served as part of the Incident Command Team on a drill with Alyeska.

15. Valdez subsidizes the hospital facility so that immediate medical care may be provided at all times to those, such as tanker personnel, transiting through or near the City. As Assistant City Manager, I have recently been involved in planning for the City to build its own hospital. The State of Alaska, which owned the Harborview facility, recently has stopped operating the facility.

16. The City of Valdez owns and operates the Airport Terminal Building, which serves as the main transportation link for the transient employees of the crude oil transportation trade.

17. The City of Valdez also has a Civic Center, which the oil shippers regularly use for their meetings. There have been approximately twenty meetings and receptions held by the shippers and oil companies at the Civic Center since January 1990. The Civic Center also has an "Exceptional Use" agreement with Alyeska to allow it special use of the facility in the case of an emergency, such as an oil spill, and for use during spill drills. There have been nine oil spill drills held at the Civic Center since January 1990.

18. The City provides trash and landfill services to the Alyeska Terminal facilities by maintaining dumpsters nearby.

Impact of the Exxon Valdez oil spill on the City of Valdez

19. In the spring of 1989, the Exxon Valdez, an oil tanker owned by Exxon, ran aground on Bligh Reef. Bligh Reef is approximately 20 miles outside Valdez city limits and about 35 to 40 miles from downtown Valdez. The Exxon Valdez oil spill had an enormous impact upon all City services and departments. The oil-spill clean-up effort necessitated the import of hundreds of workers and commensurate amounts of supplies into Valdez. Before the spill, the City administration had had staff meetings once a week. After the spill, staff meetings were conducted at least twice each week, and often, twice each day, in order to coordinate and communicate concerning the oil-spill clean-up efforts and its impact upon regular City services.

20. The City of Valdez felt the brunt of the oil-spill clean-up effort for the first six months after the spill. However, the clean-up efforts continued to con-

sume City resources for more than three years afterwards.

21. During the post-spill period, the Valdez Airport was critical as the hub for importing personnel, supplies and cargo for the clean-up effort. As a result of the spill clean-up activities, the City-owned Airport Terminal was used to its maximum capacity.

22. Similarly, the Valdez Hospital, the cost of which continually has been subsidized by the City of Valdez by approximately $1,000,000 per year, experienced a significant increase in patient visits and treatments as a result of the increased number of people working at and near the City. The Hospital Administrator attended the daily staff meetings referenced above.

23. I recall during the post-spill efforts that there was a pungent odor over parts of the City of Valdez from the City's sewer treatment ponds, which were not able to process the increased amount of waste generated by all the people involved in the spill clean-up efforts. Also, during the clean-up era, a large vessel, the Prince George, was tied to the City Dock and used to house oil-spill response workers. This vessel was about 300 feet long, and housed over 100 people. A significant amount of sewage was regularly off-loaded from this vessel by the City.

24. The Valdez Landfill also was significantly affected as a result of the Exxon Valdez oil spill, both in terms of the quantity of trash and disposal goods, and in terms of the type of materials disposed of. There was concern because a large portion of the City's designated landfill prematurely was being used up due to the sudden unanticipated amount of refuse. The City was required to set up landfill poli-

cies and procedures, and enforce those procedures. Further, the City had to establish a process for testing refuse for the presence of hazardous substances.

25. I recall that during the spill clean up, the Valdez City Police were required to patrol the dock and harbor areas due to the high volume of traffic and presence of many more people n the downtown area than was normal.

26. For several months during the clean-up response period, Valdez City employees maintained logs of their hours and materials and other charges expended relating to the oil spill. Significant employee time was diverted from regular, necessary functions in order to respond to the immediate needs that resulted from the oil spill. Exxon reimbursed the City of Valdez for a portion of the time and expenses expended by City employees.

Further your affiant sayeth naught.

APPENDIX I

A TREATISE ON THE LAW OF TAXATION AS IMPOSED BY THE STATES AND THEIR MUNICIPALITIES, OR OTHER SUBDIVISIONS, AND AS EXERCISED BY THE GOVERNMENT OF THE UNITED STATES, PARTICULARLY IN THE CUSTOMS AND INTERNAL REVENUE

BY W. H. BURROUGHS, 1877

§ 63. ***Tonnage Duty.*** The Constitution of the United States provides that "no State shall, without the consent of Congress, lay any duty of tonnage."[4] This prohibition, like the preceding one, and like the provision giving to Congress the power to regulate commerce, was designed to enable the government to give uniformity to the commerce of the States with foreign countries, and with each other. But it would have been useless to prohibit the taxing of imported goods, if the States retained the power of taxing the vessels, as such, which carried the goods. While this provision was necessary to carry out this scheme, it was not necessary to prohibit the States from taxing vessels as property in the same manner as other property of the State is taxed, and the provision has

[4] Constitution of U.S. art. 1, § 10, par. 3.

been so construed as not to interfere with such taxation.[5]

Congress has prescribed the rules of measurement and computation in ascertaining the tonnage of American ships and vessels. The word tonnage, in the light of these regulations, means the contents of the vessel expressed in tons of one hundred cubical feet each. A tax laid upon vessels graduated by this tonnage, is a duty of tonnage. It has been claimed that where the owners of the vessel reside in the State, and the tonnage is referred to as a mode to determine and ascertain the tax to be assessed, and to furnish a rule to govern the assessors in the performance of their duties, the provision is not violated, but unsuccessfully in the courts of the United States. The State of Alabama laid a tax "on all steamboats, vessels, and other water-crafts plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof," the tax to be assessed at the port where the vessels are registered, if practicable to be demanded of the person in charge of the vessel, and if not paid, the vessel to be seized and sold. Cox, a citizen of Alabama, the owner of a steamboat enrolled and licensed for the coasting trade, engaged in the navigation of the Alabama, Bigbee, and Mobile rivers, carrying freight and passengers between Mobile and points on these rivers, altogether within the limits of the State, paid the tax under protest and brought suit to recover it, on the ground that it was a tonnage tax, or duty of tonnage. The Supreme Court of Alabama thought

[5] Perry *v.* Torrance, 8 Ohio, 521; Hays *v.* The Pacific Mail Steamship Co. 17 How. 598; State Tonnage Tax Cases, 12 Wall. 213.

this was a tax on the boats as property, and that their registered tonnage was referred to merely as a means of determining the amount of the tax to be imposed,[1] distinguishing it from a case in South Carolina, where the vessels were engaged in a coasting trade,[2] and from a case in Alabama, where the boats were used in transporting cargoes to and from vessels on Mobile bay engaged in foreign commerce.[3] In the Supreme Court of the United States, this decision was reversed, the court holding the tax to be a duty of tonnage, and that the fact that the steamboat was not only owned by a citizen of the State, but exclusively engaged in trade between places within the State, did not change the character of the tax.[4] It was said that the tax was laid on steamboats, wholly irrespective of their value as property, and exclusively on the basis of their cubical contents, and was therefore within the express terms of the prohibition.[5]

The oyster law of Virginia contained this provision : "Every captain or officer of a vessel which shall be employed in carrying oysters taken in the waters of Virginia, shall obtain from an inspector a license, for which he shall pay to said inspector a tax of three dollars per ton, for every ton said vessel may measure, according to the custom house enrollment or li-

[1] Lott *v.* Mobile Trade Co. 48 Ala. 578.

[2] Alexander *v.* Wilmington & Raleigh R. R. 3 Strobh. 594.

[3] Lott *v.* Morgan, 41 Ala. 246.

[4] State Tonnage Tax Cases, 12 Wall. 204.

[5] Id. 217. See also Cannon *v.* New Orleans, 20 Wall. 577; s. o. 2 Cent. L. J. 66; N. W. U. Packet Co. *v.* St. Paul, 2 Cent. L. J. 437; s. o. Chicago L. N. July 3, 1875; Peete *v.* Morgan, 1 Cent. L. J. 413 ; s. o. 19 Wall. 581.

cense." This was held to be a duty of tonnage, a tax upon the vessel, the vehicle of commerce.[6] And where the tax is not measured by the tonnage of the vessel, but is a fixed sum upon the ship, as where the wardens of a port are authorized to demand and receive five dollars for every vessel arriving in port, whether called on to perform any service or not, it is within the prohibition. It is the tax or duty upon the ships as vehicles of commerce, which is prohibited. Said Mr. Justice Miller, in Cannon *v.* New Orleans (*supra*): "Whatever more general, or more limited view may be entertained of the true meaning of this clause, it is perfectly clear that a duty, or tax, or burden imposed under the authority of the State, which is, by the law imposing it, to be measured by the capacity of the vessel, and is in its essence a contribution claimed for the privilege of arriving and departing from a port of the United States, is within the prohibition."[1] This tax on tonnage, or on the vessel, is as much a tax as a tax on imports or exports, or as a tax on the goods themselves which are carried in the vessels, and the reason which induced the framers of the Constitution to withdraw imports and exports from taxation, apply as strongly to the vessels engaged in carrying the goods.[2]

We have seen heretofore, in § 47, that vessels of all kinds, as property, were liable to taxation in the same manner as other personal property owned by citizens of the State. The prohibition only comes into play where they are not taxed in the same manner as

[6] Johnson *v.* Drummond, 20 Gratt. 419-422.

[1] Steamship *v.* Joliffe, 2 Wall 31, 34.

[2] 20 Gratt. 202, 423; 12 Wall. 215; Gibbons *v.* Ogden, 9 Wheat. 202.

other property of citizens of the State, but where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel.

There is an important exception to this rule, in the matter of pilot fees and half-pilot fees. When the Constitution of the United States was adopted, the different States had each laws of their own for the regulation of pilots and pilotage. Under the power to regulate commerce, Congress had power to control this subject, and it exercised the power by the act of 1789,[3] which left the subject of pilots and pilotage to be regulated by the laws then in existence, and to be thereafter enacted by the respective States, until further legislation by Congress. With the exception of the act of 1837,[4] allowing the master of a vessel, entering or departing from a port situate upon waters the boundary between two States, to take a licensed pilot from either State, no further legislation was had until 1852. The earliest case on this subject arose out of a statute of Pennsylvania, requiring vessels arriving or departing from the port of Philadelphia, to take a pilot, requiring the master on arrival or departure to make report to the wardens of the port, and inflicting a penalty of sixty dollars for neglect or refusal, and in case the vessel refused to take pilot imposing a forfeiture of half-pilotage. It was held, that the mere grant to Congress of the power to regulate commerce, did not prevent the States from regulating pilots ; that the action of Congress on the subject had been such as to leave the States free to make regulations without conflicting with the will of

[3] 1 Statutes, p. 54.

[4] 5 Statutes at Large, 153.

Congress, and that these regulations of Pennsylvania were not a duty of tonnage.[1] The claim for half-pilotage is placed upon the ground that pilots are a meritorious class, engaged in a service full of hardships and often of peril; that in the performance of their duties they are shut out from the pursuit of any other occupation, and that they are necessary to give security to life and property exposed to the dangers of a difficult navigation. If the selection of a pilot were left to the choice of a master, or the exertions of a pilot to reach a vessel and tender his services were without remuneration, this class, absolutely necessary to commerce, could not be sustained. All commercial States, from the earliest period, have had similar laws. The Romans and the Danes had such laws, and the Hanseatic ordinance of 1457 required the captain to take a pilot under the penalty of a mark of gold. The maritime code of the *Pays Bats*, and maritime law of France, of 1618, imposed penalties on captains refusing to take pilots; the latter also imposed corporal punishment.[2] Under the pilot laws of California, a licensed pilot offered his services to an American ocean steamer, registered at the custom house in the port of New York, and exclusively employed in navigating the ocean and carrying passengers and treasure between San Francisco and Panama. His services were refused, and he brought suit for the half-pilotage. It was claimed that not only did the statute of California violate the provision of the Constitution as a tonnage duty, but that the act of Congress of the 30th of August, 1852, "to amend an act entitled an act to provide for the better

[1] Cooley *v.* Board of Wardens of the Port of Philadelphia, 12 How. 299.

[2] *Ex parte* McNeill, 13 Wall. 239.

security of the lives of passengers on board of vessels propelled in whole or in part by steam," had established pilot regulations, and that Congress having exercised the power to regulate commerce through this law, all regulations by the States were inconsistent therewith, and void. The court held that it was not a duty of tonnage, and that the act of 1852 did not establish pilot regulations for ports, its object being to provide a system under which the masters and owners of vessels propelled in whole or in part by steam may be required to employ competent pilots to navigate such vessels on their voyage.[1] The fee required by the ordinance of a city to be paid to the harbor master, for assigning a vessel its place at its wharf or in the harbor is not a duty of tonnage.[2]

[1] Steamship *v.* Joliffe, 2 Wall 450. Miller, Swayne and Clifford, JJ., dissented, holding that the act of 1852 was a regulation of pilots, and applied to pilots in ports as well as on a voyage. *Ex parte* McNeill, 18 Wall. 236, affirms previous cases as to the validity of half-pilotage.

[2] State *v.* City Council of Charleston, 4 Rich. (Law), 286.

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
JAN 26 2009
OFFICE OF THE CLERK

118 (6)

No. 08-310

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF FOR THE PETITIONER

RICHARD A. LEAVY
KWAKU A. AKOWUAH
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

BOTH 4A TAPF

83497 A 64

QUESTIONS PRESENTED

1. Whether a municipal personal property tax that falls exclusively on large vessels using the municipality's harbor violates the Tonnage Clause of the Constitution, Art. I, § 10, Cl. 3.

2. Whether a municipal personal property tax that is apportioned to reach the value of property with an out-of-State domicile for periods when the property is on the high seas or otherwise outside the taxing jurisdiction of any State violates the Commerce and Due Process Clauses of the Constitution.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a wholly owned subsidiary of ConocoPhillips Company, which in turn is wholly owned by ConocoPhillips.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT 2

A. The Valdez Tonnage Tax 3

B. Proceedings Below 5

INTRODUCTION AND SUMMARY OF ARGUMENT 9

ARGUMENT 11

I. THE VALDEZ VESSEL TAX VIOLATES THE TONNAGE CLAUSE. 11

A. The Tonnage Clause Precludes State Taxes That Discriminate Against Vessels Making Use Of The Taxing Jurisdiction's Ports. 12

B. The Valdez Tax Discriminates Against Vessels Making Use Of The City's Port. 22

II. THE VALDEZ APPORTIONMENT FORMULA TAXES EXTRATERRITORIAL PROPERTY VALUES AND CREATES A CLEAR RISK OF DUPLICATIVE TAXATION 26

TABLE OF CONTENTS continued

Page

A. The Valdez Formula Taxes Extraterritorial Values.....28

B. The Due Process And Commerce Clauses Preclude Valdez From Taxing Property Of Non-Domiciliaries When That Property Lies Beyond Its Borders.....30

1. A state or local jurisdiction may not impose property taxes on extraterritorial values.....30

2. Apportionment of a personal property tax must rest on an assessment intended to measure the taxable object's actual proportionate presence within the taxing jurisdiction.....33

3. The record evidence shows that the Valdez formula has, in fact, produced malapportioned taxation.....40

C. The Valdez Formula Subjects Petitioner's Property To An Impermissible Risk Of Duplicative Taxation.....41

TABLE OF CONTENTS continued

Page

1. A domicile may tax movable property for periods when the property has no tax situs. 42

2. A threat of duplicative taxation also flows from Valdez's taxation of vessels for periods they spend in other ports for repairs or because of a strike. 47

CONCLUSION 49

ADDENDUM:

Act of Dec. 21, 1804, 2 Acts of the Gen. Ass'y of S.C. 553 ..... 1a

Act of Mar. 28, 1806, Ch. 17, 2 Stat. 357 ..... 3a

TABLE OF AUTHORITIES

Page(s)

CASES

Alexander v. *Wilmington & Raleigh R.R. Co.*, 34 S.C.L. (3 Strob.) 594 (1868) 16, 24-25

Appraisal Review Bd. v. *Tex-Air Helicopters, Inc.*, 970 S.W.2d 530 (Tex. 1998) 46

Asarco Inc. v. *Idaho State Tax Comm'n*, 458 U.S. 307 (1982) 31

Battle v. *Corp. of Mobile*, 9 Ala. 234 (1846) 18

Bigelow v. *Dep't of Taxes*, 652 A.2d 985 (Vt. 1994) 23

Braniff Airways, Inc. v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590 (1954) 45

Cannon v. *New Orleans*, 87 U.S. (20 Wall.) 577 (1874) 15, 16

Central R.R. Co. of Pa. v. *Pennsylvania*, 370 U.S. 607 (1962) ..... *passim*

Clyde Mallory Lines v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935) 14, 15, 16, 17

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 21

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 26, 27, 32, 36

Cook v. *Pennsylvania*, 97 U.S. 566 (1878) 20

Cooley v. *Bd. of Port Wardens*, 53 U.S. (12 How.) 299 (1852) 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Dep't of Revenue v. *Ass'n of Wash. Stevedoring Cos.*,
435 U.S. 734 (1978) 13, 14, 19, 21

East West Express, Inc. v. *Collins*,
449 S.E.2d 599 (Ga. 1994) 46

Fargo v. *Hart*,
193 U.S. 490 (1904) 34, 37

Gibbons v. *Ogden*,
22 U.S. (9 Wheat.) 1 (1824) 19, 24

Goldberg v. *Sweet*,
488 U.S. 252 (1988) 37

H.P. Hood & Sons v. *DuMond*,
336 U.S. 525 (1949) 38

Hays v. *Pac. Mail S.S. Co.*,
58 U.S. (17 How.) 596 (1855) 19

Howell v. *State*,
3 Gill 14 (Md. 1845) 18

Ice Capades, Inc. v. *County of Los Angeles*,
56 Cal. App. 3d 745 (1976) 46

In re Wheeling Steel Corp. Assessment Personal Prop. Brooke County 1951 Taxes,
73 S.E.2d 644 (W.Va. 1952) 47

Inman S.S. Co. v. *Tinker*,
94 U.S. 238 (1877) 15

Japan Line, Ltd. v. *County of Los Angeles*,
441 U.S. 434 (1979) ..... *passim*

Japan Line, Ltd. v. *County of Los Angeles*,
571 P.2d 254 (Cal. 1977) 9, 23

TABLE OF AUTHORITIES (continued)

Page(s)

Jet Fleet Corp. v. *Dallas County Appraisal Dist.*, 773 S.W.2d 744 (Tex. Ct. App. 1988)..... 46

Johnson Oil Ref. Co. v. *Oklahoma*, 290 U.S. 158 (1933)..... 33, 35, 42

Johnson v. *Drummond*, 61 Va. (20 Gratt.) 419 (1871)..... 18

Low v. *Austin*, 80 U.S. (13 Wall.) 29 (1872)..... 19, 20

MeadWestvaco Corp. v. *Ill. Dep't of Revenue*, 128 S. Ct. 1498 (2008)..... 31, 32

Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976).....*passim*

Mobil Oil Corp. v. *Comm'r of Taxes*, 445 U.S. 425 (1980)..... 27, 28

Moorman Mfg. Co. v. *Bair*, 437 U.S. 267 (1978)..... 37

N. Slope Borough v. *Puget Sound Tug & Barge*, 598 P.2d 924 (Alaska 1979) 47

Nashville, Chattanooga & St. L. Ry. Co. v. *Browning*, 310 U.S. 362 (1940)..... 36

Norfolk & W. Ry. Co. v. *Mo. State Tax Comm'n*, 390 U.S. 317 (1968) .....*passim*

Nw. Airlines, Inc. v. *Minnesota*, 322 U.S. 292 (1944)..... 33

Or. Waste Sys., Inc. v. *Dep't of Envtl. Quality*, 511 U.S. 93 (1994)..... 21-22

Ott v. *De Bardeleben Coal Corp.*, 166 F.2d 509 (5th Cir. 1948)..... 47

TABLE OF AUTHORITIES
(continued)

Page(s)

Ott v. *Miss. Valley Barge Line Co.*,
336 U.S. 169 (1949) 32, 45, 47

Packet Co. v. *Keokuk*,
95 U.S. 80 (1877) 12, 15, 16, 19

Perry v. *Torrence*,
8 Ohio 521 (1838) 17

Pullman's Palace Car Co. v. *Pennsylvania*,
141 U.S. 18 (1891) 19, 32

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) 26

R.I. Hosp. Trust Co. v. *Doughton*, 270 U.S. 69
(1926) 34

Ryder Truck Rental, Inc. v. *County of*
Chesterfield, 449 S.E.2d 813 (Va. 1994) 46

Standard Oil Co. v. *Peck*,
342 U.S. 382 (1952) 46

State Tonnage Tax Cases,
79 U.S. (12 Wall.) 204 (1871) 13, 15

State v. *Turnbaugh*,
705 A.2d 530 (R.I. 1997) 24

Steamship Co. v. *Portwardens*,
73 U.S. (6 Wall.) 31 (1867) 14, 15, 16

The Passenger Cases,
48 U.S. (7 How.) 283 (1849) 17, 19

Transp. Co. v. *Wheeling*,
99 U.S. 273 (1879) 17, 18, 19, 22

Transp. Co. v. *Parkersburg*,
107 U.S. 691 (1883) 12, 16

TABLE OF AUTHORITIES
(continued)

Page(s)

Underwood Typewriter Co. v. *Chamberlain*,
254 U.S. 113 (1920) 36, 37
Union Refrigerator Transit Co. v. *Kentucky*,
199 U.S. 194 (1905) 34, 42
Union Tank Line Co. v. *Wright*,
249 U.S. 275 (1919) 34, 35, 36, 40
United States v. *Allegheny County*,
322 U.S. 174 (1944) 33
Wallace v. *Hines*,
253 U.S. 66 (1920) 37

CONSTITUTIONAL PROVISIONS

Commerce Clause, Art. I, § 8, Cl. 3 ..... *passim*
Import-Export Clause, Art. I, § 10, Cl. 2 ..... *passim*
Tonnage Clause, Art. I, § 10, Cl. 3 ..... *passim*
Due Process Clause, Amend. XIV ..... *passim*

STATUTES

28 U.S.C. § 1257 1
Act of Mar. 28, 1806,
Ch. 17, 2 Stat. 357 24
Act of Dec. 21, 1804,
2 Acts of the Gen. Ass'y of S.C. 553 24

OTHER AUTHORITIES

Articles of Confederation, Art. VI, § 3 12
Brief for Appellants, *Japan Line, Ltd.* v.
County of Los Angeles, 441 U.S. 434 (1979)
(No. 77-1378) 44

TABLE OF AUTHORITIES
(continued)

Page(s)

Brief for Appellees, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979) (No. 77-1378) 44

W.H. Burroughs, *A Treatise on the Law of Taxation* (1877) 17, 18

M. Farrand, *The Records of the Federal Convention of 1787* (1911) 12, 13, 14, 21

Hellerstein & Hellerstein, *State Taxation* (3d ed. 2000) 46

J. Madison, *Preface to Debates in the Convention of 1787* 12, 13

S.F. Miller, *Lectures on the Constitution of the United States* (1891) 15

J. Story, *Commentaries on the Constitution of the United States* (2d ed. 1851) 14

Valdez Municipal Code:

§ 3.12.020(A)(1) 3

§ 3.12.020(C)(1) 4

Valdez Ordinance No. 99-17 ..... *passim*

Valdez Resolution No. 00-15 ..... *passim*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Alaska (Pet. App. 1a-22a) is reported at 182 P.3d 614. The opinions of the Superior Court for the State of Alaska (Pet. App. 23a-44a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Alaska was entered on April 25, 2008. On July 22, 2008, Justice Kennedy extended the time for filing a petition for a writ of certiorari until September 8, 2008. The petition was timely filed on that date and granted on December 12, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Tonnage Clause of the United States Constitution, Art. I, § 10, Cl. 3, provides, in relevant part:

> No State shall, without the Consent of Congress, lay any Duty of Tonnage * * *.

The Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 8, Cl. 3, provides, in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States * * *.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * *.

STATEMENT

The City of Valdez, Alaska ("the City"), contains the northernmost ice-free port in North America. JA 74. This location makes the City a crucial hub of interstate commerce. In Valdez, the Trans Alaska Pipeline System reaches its southern terminus. Crude oil that originates on the North Slope of Alaska passes through the pipeline to Valdez, where it is loaded into tankers en route to other States.

In 1999, Valdez faced a budget shortfall. Funds were needed to build a hospital and a school, and to repair the city's infrastructure and facilities. Pet. App. 54a. To meet this need, the City passed Ordinance No. 99-17, which enacted a personal property tax on certain vessels over 95 feet in length. Pet. App. 45a. Because almost all of those vessels are tankers that transport oil between Alaska and the Pacific coast of the United States (including Hawaii), and that accordingly also are subject to property tax in other States, the City subsequently adopted Resolution No. 00-15, which establishes a methodology for apportioning the tax. Pet. App. 53a.

This case concerns the constitutionality of the vessel tax and its apportionment methodology under three provisions of the Constitution that limit the taxing authority of state and local governments. One is the Tonnage Clause, Art. I, § 10, Cl. 3, which bars state and local governments from taxing the privilege of using ports and harbors. The others are the Commerce Clause, Art. I, § 8, Cl. 3, and the Fourteenth Amendment's Due Process Clause, both of which preclude non-domiciliary state and local governments from taxing extraterritorial values.

The City's tax runs afoul of all three of these constitutional proscriptions. It is a discriminatory per-

sonal property tax that falls *only* on certain large vessels and that has the avowed purpose of raising revenue from vessels that dock in the City; this is precisely the sort of levy that the Court has described as violating of the Tonnage Clause. Moreover, Valdez compounded its constitutional error by apportioning the levy so as to claim a right to tax vessels domiciled elsewhere for a portion of the time that those vessels spend on the high seas (or otherwise away from any tax situs); this both projects the City's taxing authority beyond its constitutional bounds and exposes the vessels to the possibility of duplicative taxation.

Because the ruling of the Alaska Supreme Court upholding the Valdez tax rests on a plain misunderstanding of this Court's decisions, improperly expands local taxing authority at the expense of out-of-state interests and interstate commerce, and denies petitioners protections safeguarded by the U.S. Constitution, the judgment below should be reversed.

A. The Valdez Tonnage Tax

Prior to 2000, Valdez exempted all personal property from property tax. Effective that year, the City repealed the personal property tax exemption for one, and only one, type of personal property: "[b]oats and vessels of at least 95 feet in length" that are not used "primarily in some aspect of commercial fishing" and that dock at privately owned docks in the City. Valdez Ordinance No. 99-17 (codified at Valdez City Code § 3.12.020(A)(1)) (Pet. App. 45a). As a practical matter, the Valdez personal property tax falls almost exclusively on oil tankers and vessels that escort or assist oil tankers in Prince William Sound. When the tax was first assessed in early 2000, it applied to 28 vessels, of which 24 were oil

tankers, three were tugboats, and one was a passenger cruise ship. JA 53. This was not an accident: imposition of the personal property tax on such vessels "climaxed a long-term effort by the City to address a serious financial dilemma" caused by depreciation of "oil and gas property" that formed a "significant portion of the available tax base located in the City." Pet. App. 38a. In adopting the ordinance, members of the city council and the mayor focused exclusively on the relationship between the oil companies and the City, and explained that they were hoping through the ordinance to reopen long-running negotiations intended to induce the companies to make "annual payments in lieu of tax." JA 47, 58-61.

Valdez applies the personal property tax to vessels that have acquired a tax situs in the City. Valdez City Code § 3.12.020(C)(1) (Pet. App. 46a). When a vessel also has a tax situs elsewhere for a portion of the year (as do all tankers subject to the tax, including those of petitioner), Valdez applies an apportionment formula that calculates the value subject to tax in the City by multiplying the total assessed value of the vessel by "a ratio determined by the number of days spent in Valdez divided by the total number of days *spent in all ports*, including Valdez, where the vessel has acquired a situs for taxation." Valdez Resolution No. 00-15, § 1(A) (Pet. App. 55a) (emphasis added). This approach *excludes* from the denominator of the apportionment formula all time spent by a vessel on the high seas or otherwise outside the jurisdiction of a tax situs.[1]

[1] The resolution further provides that "[d]ays in port do not include periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs." Valdez Resolution No. 00-15, § 1(C) (Pet. App. 55a).

Thus, as the Alaska Supreme Court described the tax, "if we assume that a tanker is in port in Valdez for fifty days a year and in port in all jurisdictions including Valdez for 150 days per year, the Valdez apportionment ratio would be 50/150." Pet. App. 13a. Because oil tankers invariably spend a significant portion of the year on the high seas, the Valdez formula increases the portion of the vessel's value that is subject to taxation by the City, effectively taxing the vessels while they are on the high seas.

B. Proceedings Below

1. Petitioner is a corporation that is organized under the laws of Delaware and that, during the tax years at issue here, had its principal place of business in Long Beach, California. (Its principal office is now in Houston, Texas.) Petitioner's primary business is operating tankers that transport crude oil from the terminal in Valdez to refineries in California, Hawaii, and Washington. Typically, a tanker leaves a port in one of those States and travels across international waters for approximately three to six days on its way to Valdez. It then spends approximately fourteen to twenty-four hours in Valdez to load cargo, followed by three to six days in international waters in transit to a discharge port, and thirty-six to seventy-two hours in that port. After discharging its cargo, the tanker begins the cycle again. Approximately every other year the tanker will be removed from service for a substantial period of time to enter drydock for maintenance and repairs. Such maintenance is not conducted in Valdez. JA 17; R. Exc. 189-190.

2. In March 2000, the City issued its first property tax assessments under Ordinance 99-17. Tax

statements followed in July. Polar Tankers paid the vessel tax under protest. It also protested the apportionment methodology employed by the City and, availing itself of the appeal procedure provided by § 2 of the resolution, filed a Petition for Use of Alternative Apportionment Formula. JA 21-31. That petition was denied by the city manager, and then by the city council. JA 52. For subsequent tax years, Polar Tankers and Valdez stipulated that further appeals were unnecessary to preserve petitioner's right to challenge the tax. JA 7, 17.

3. On August 18, 2000, petitioner filed suit in Alaska state court challenging the constitutionality of the levy on two grounds: (1) that the tax violates the Tonnage Clause because it effectively taxes vessels for the privilege of using the City's harbor; and (2) that the City's apportionment methodology violates the Commerce and Due Process Clauses, both by subjecting vessels to the risk of duplicative taxation and by taxing extraterritorial values.[2] The parties filed cross-motions for summary judgment, and the trial court initially concluded in July 2004 that the tax was unconstitutional under the Tonnage Clause. Pet. App. 36a-44a. The court found that "[l]arge vessels, and only large vessels, are the only personal property taxed by the City. In little sense then can it be considered a property tax of general application falling on oil tankers along with other types of property. This is a tonnage duty." Pet. App. 43a.

[2] Initially, five companies with vessels subject to the tax joined as plaintiffs. At various stages of the litigation the other four companies settled their disputes, leaving Polar Tankers the only claimant.

On reconsideration in January 2005, the trial court changed course and reserved judgment on the Tonnage Clause issue, instead concluding that the City's apportionment method violated the Commerce and Due Process Clauses because "the tax creates a risk of multiple taxation by both domiciliary and non-domiciliary states." Pet. App. 34a. In the court's view, the State of a vessel's domicile retains the right to tax the value of the vessel for all the time that the vessel is on the high seas and has no specific tax situs, rendering the "denominator [of the Valdez apportionment formula] problematic because it ignores the possibility that a domiciliary state may tax a ship while it is in international waters." Pet. App. 34a-35a. Using the example of one of petitioner's coplaintiffs, the court concluded: "SeaRiver's ships are domiciled in Texas; thus, Texas may enact a property tax on SeaRiver's ships while they are in international waters. Since Valdez is already taxing those ships for part of the time they actually spend in international waters, there is risk of multiple taxation." Pet. App. 35a. The court accordingly ruled that Valdez could impose its tax only if it made use of an acceptable apportionment formula. Pet. App. 31a-32a.

Because the tax ordinance is severable from the apportionment resolution, the trial court proceeded to reconsider its Tonnage Clause ruling. On July 28, 2005, the court reversed its earlier opinion and rejected petitioner's Tonnage Clause challenge. Pet. App. 26a-30a. Although the court continued to recognize that "the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (Pet. App. 29a), and is not "generally applicable" (Pet. App. 30a), it concluded that "[t]he failure of the City to tax more property does not make its taxation of all

property of this class an unconstitutional tonnage tax." *Ibid.*

4. On cross-appeals, the Alaska Supreme Court upheld the Valdez tax in its entirety, rejecting both the Tonnage Clause and the apportionment challenges. Pet. App. 1a-22a. Addressing apportionment first, the court recognized that "[a] tax may be invalid even if it creates only a risk of duplicative taxation." Pet. App. 11a. But the court found the Valdez apportionment formula proper because it "apportions the full value of a ship between the taxing jurisdictions in which it is regularly present in proportion to the number of days during the tax year that the ship is present in each jurisdiction. * * * There is no reason why the days at sea outside the jurisdiction of any taxing authority should be included in the denominator of the fraction." Pet. App. 12a-13a.

The court specifically rejected the possibility of duplicative taxation in this context, on the ground that the domicile State may *not* "extraterritorially tax its vessels for all time spent on the open seas." Pet. App. 13a n.26. In the Alaska Supreme Court's view, this Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), had "repudiat[ed]" the nineteenth century "home port" doctrine, which had posited that *only* the home port of a vessel could subject it to property tax, even if the vessel were habitually used in another jurisdiction. Pet. App. 13a n.26. That repudiation of the home port doctrine, the Alaska court believed, precluded the taxation of personal property by the owner's domicile for the period when the property had no specific tax situs. *Ibid.*

The Alaska Supreme Court went on to hold the Valdez tax consistent with the Tonnage Clause, rea-

soning that "a fairly apportioned ad valorem tax on personal property * * * necessarily * * * does not violate the Tonnage Clause." Pet. App. 18a. Relying on the California Supreme Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), rev'd on other grounds, 441 U.S. 434 (1979), the Alaska court found it immaterial that the Valdez tax is "imposed only on specific vessels." Pet. App. 19a-20a. In the court's view, it is sufficient to satisfy the Tonnage Clause that the challenged levy is "based on the value of property." Pet. App. 20a, 21a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Alaska Supreme Court's decision is manifestly inconsistent with this Court's precedents. Those precedents establish that a state property tax that discriminates against vessels making use of local ports is barred by the Tonnage Clause, yet that is precisely what the Valdez tax does, and indeed was *designed* to do. At the same time, the City's assertion of taxing authority over personal property domiciled in another State for a portion of the time when the property has *no* specific tax situs – as well as the Alaska court's insistence that the State where the property *is* domiciled *lacks* the authority to fully tax personal property for periods when that property is not located in any taxing jurisdiction – rests on propositions that have been rejected by this Court. The decision below therefore departs in two respects from constitutional rules intended to prevent States and municipalities from fomenting interstate economic tension and taking more than their fair share of taxable values.

I. The Tonnage Clause, along with the Import-Export Clause, was placed in the Constitution in response to the problem created by States that took advantage of their seaboard location to impose financial burdens on other States that have less favorable access to maritime commerce. To effectuate this intent, the Court consistently has interpreted the Tonnage Clause to preclude the imposition by the States of all levies, in whatever form, that have the effect of taxing the privilege of entering, trading in, or lying in a port. Although this prohibition does not extend to charges for specific services offered to ships or to taxes of general application that happen to fall on ships, a levy that singles out vessels is forbidden by the Clause. This anti-discrimination principle, which also applies under the Import-Export Clause, is an essential element of Tonnage Clause doctrine.

The Valdez tax cannot survive application of this principle. It is a personal property tax that falls *only* on certain large vessels and was written specifically to exact revenues from that category of commerce. It is not a charge for particular services made available only to vessels; it avowedly was imposed to raise general revenues. A tax that effectively singles out ocean-going tankers used to export goods through the Port of Valdez is precisely the sort of levy that is prohibited by the Tonnage Clause.

B. The apportionment formula employed by Valdez violates the Due Process and Commerce Clauses. In determining the proportion of a vessel's value that it will tax, Valdez uses a fraction that places in the numerator the number of days of the year that the vessel spends in Valdez, and in the denominator the number of days the vessel spends in *all ports* (omitting port days for which the vessel is under repair or tied up because of strikes). By excluding from the

denominator of the apportionment fraction the many days that tankers spend outside of Valdez (either on the high seas in revenue-producing service or in another port for repairs or because of a strike), Valdez taxes a share of each ship's value that far exceeds the portion of the year that the vessel actually is present within the City's territorial jurisdiction.

This approach violates the Constitution for two closely related reasons. It is fundamental that a State or municipality that is not the taxpayer's domicile lacks the constitutional authority to tax the portion of the taxpayer's personal property that lies outside the taxing jurisdiction; but that is just what Valdez does. And it is equally basic that the State of the taxpayer's domicile *does* have the authority to tax the value of the taxpayer's personal property for periods when that property has no tax situs – a rule that will lead to duplicative taxation if both petitioner's domicile and Valdez tax petitioner's tankers for the time when those vessels are on the high seas. Overlapping taxation also will result if both Valdez and the ports where tankers are under repair or held up on strike tax the vessels for periods when the ships are out of service. This prospect of material and substantial duplicative taxation also renders the City's tax unconstitutional.

ARGUMENT

I. THE VALDEZ VESSEL TAX VIOLATES THE TONNAGE CLAUSE.

When a State or a municipal corporation singles out vessels for special tax burdens to obtain revenue for its general account, that tax violates the Tonnage Clause, which provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art. I, § 10, Cl. 3. The Valdez

vessel tax – which was levied for the express purpose of extracting revenue from ships to subsidize local needs, and which falls only on specified large vessels – lies squarely within that prohibition.

A. The Tonnage Clause Precludes State Taxes That Discriminate Against Vessels Making Use Of The Taxing Jurisdiction's Ports.

The Tonnage Clause has fallen into relative obscurity in modern times, in part because it has been generally successful in effectuating the Framers' goal of discouraging levies that have the effect of taxing vessels for the privilege of using a harbor. But the meaning of the Clause is settled. A duty of tonnage is "a charge for the privilege of entering, or trading, or lying in, a port or harbor." *Transp. Co.* v. *Parkersburg*, 107 U.S. 691, 696 (1883). By enacting the Tonnage Clause, the Framers sought "to guard against local hindrances to trade and carriage by vessels," *Packet Co.* v. *Keokuk*, 95 U.S. 80, 85 (1877), which "never ceased to be a source of dissatisfaction & discord" under the Articles of Confederation. J. Madison, Preface to Debates in the Convention of 1787, in 3 M. Farrand, *The Records of the Federal Convention of 1787*, at 542 (1911).

1. Under the Articles of Confederation, the States retained the independent power to regulate commerce except to the extent that a treaty was implicated. Art. VI, § 3. This decentralized power "engendered rival, conflicting and angry regulations," such that "some of the States, * * * having no convenient ports for foreign commerce, were subject to be taxed by their neighbors, thro whose ports, their commerce was carryed on." Madison, *supra*, in 3 Farrand, *supra*, at 542. As James Madison described

it, "New Jersey, placed between Phila. & N. York, was likened to a Cask tapped at both ends: and N. Carolina between Virga. & S. Carolina to a patient bleeding at both Arms." *Ibid.* "[I]t was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union under the present Constitution." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 214 (1871).[3]

To address this serious national problem, the first draft of the Constitution provided that "no state * * * shall lay imposts or duties on imports." 2 Farrand, *supra*, at 135, 187. The Constitution's language subsequently was broadened to include exports. *Id.* at 577.[4] But the Import-Export Clause, as

[3] Some States' exploitation of their geographic advantage "'never ceased to be a source of dissatisfaction & discord, until the new Constitution, superseded the old.'" *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283-284 (1976) (quoting Madison, *supra*, in 3 Farrand, *supra*, at 542). See *id.* at 285 ("'the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them'") (quoting Madison, *supra*, in 3 Farrand, *supra*, at 548).

[4] "The Framers of the Constitution thus sought to alleviate concerns" about interstate discord and to preserve "harmony among the States" by prohibiting "seaboard States, with their crucial ports of entry, * * * from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Michelin Tire*, 423 U.S. at 285-286. The Import-Export Clause accordingly was "fashioned to prevent the imposition of exactions which were no more than transit fees on the privilege of moving through a State" (*id.* at 290), so as "to prevent coastal States from abusing their geographical positions" and thus "to prevent interstate rivalry and friction." *Dep't of Revenue* v. *Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 753-754 (1978). Although the Court in *Michelin Tire* was addressing imports,

it stood, was insufficient to resolve the problem of States exploiting their port facilities to the disadvantage of other jurisdictions. The Framers recognized that "[t]he general prohibition upon the States against levying duties on imports or exports would have been ineffectual if it had not been extended to duties on the ships which serve as the vehicles of conveyance." *Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31, 34-35 (1867); accord *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 264-265 (1935) ("If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise."). After John Langdon "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it" (2 Farrand, *supra*, at 625-626), the Framers incorporated the Tonnage Clause into the Constitution "to supplement Art. I, § 10, Clause 2 [the Import-Export Clause], denying to the states the power to lay duties on imports or exports * * * by forbidding a corresponding tax on the privilege of access by vessels to the ports of a state." *Clyde Mallory Lines*, 296 U.S. at 264.

As Justice Story wrote, through the operation of the Import-Export and Tonnage Clauses, "[a] petty warfare of regulation is thus prevented, which would rouse resentments and create dissensions, to the ruin of the harmony and amity of the states." 3 J. Story, *Commentaries on the Constitution of the United States* § 1016, at 704 (2d ed. 1851).

the same policies apply to exports. See *Wash. Stevedoring*, 435 U.S. at 758 ("any tax relating to exports can be tested for its conformance" with the policies identified in *Michelin Tire*).

2. The Tonnage Clause must be interpreted to effectuate the intent of the Framers. As a literal matter, "tonnage" refers to the "entire internal cubical capacity, or contents of [a] ship or vessel expressed in tons of one hundred cubical feet each." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 212. As Justice Miller explained, "[t]he word 'tonnage' was used by the framers of the Constitution, because at that day and time it was the customary mode of measuring the value of a ship." S.F. Miller, *Lectures on the Constitution of the United States* 253 (1891). But it has long been understood that the Tonnage Clause is not limited to this literal scope. See *Portwardens*, 73 U.S. (6 Wall.) at 34 ("In the most obvious and general sense it is true, those words describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton. But it seems plain that, taken in this restricted sense, the constitutional provision would not fully accomplish its intent."); see also *Keokuk*, 95 U.S. at 87 ("A mere adherence to the letter, without reference to the spirit and purpose, may in this case mislead as it has misled in other cases.").

Consistent with the purpose of the Tonnage Clause, the Court instead has understood it to prohibit "levies upon the privilege of access by vessels or goods to the ports or to the territorial limits of a state." *Clyde Mallory Lines*, 296 U.S. at 265. This restriction proscribes not only state and local[5] taxes that literally fall upon the tonnage of a vessel (see, *e.g.*, *Inman S.S. Co.* v. *Tinker*, 94 U.S. 238, 243-245 (1877)) or that expressly purport to be on the "privilege" of port access, but also "all taxes and duties re-

[5] The Tonnage Clause has frequently been applied to municipal corporations that act "under the authority of the State." *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577, 581 (1874).

gardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines*, 296 U.S. at 265-266; accord *Portwardens*, 73 U.S. (6 Wall.) at 35.

3. Although the prohibition against tonnage duties absent approval by Congress is absolute, not all exactions upon vessels are proscribed. The Valdez tax, however, falls far outside the range of permissible levies.

First, "a charge for services rendered or for conveniences provided is in no sense a tax or a duty" and does not constitute a "local hindrance[] to trade and carriage by vessels." *Keokuk*, 95 U.S. at 84-85. Under this principle, there is no constitutional obstacle when a State collects fees for services such as pilotage (see *Cooley* v. *Bd. of Port Wardens*, 53 U.S. (12 How.) 299, 314 (1852)) or wharfage (*Parkersburg*, 107 U.S. at 698). But where a tax, supposedly for a service, applies whether or not that service is provided, it constitutes a prohibited tonnage duty. *Cannon*, 87 U.S. (20 Wall.) at 580-581; see also *Keokuk*, 95 U.S. at 86 (distinguishing between "a sovereign exaction" and "a charge for compensation"); *Alexander* v. *Wilmington & Raleigh R.R. Co.*, 34 S.C.L. (3 Strob.) 594, 599 (1868) ("The distinction between a tax or duty, and fees or charges, is, that the former is imposed by the sovereign authority, without any regard to a corresponding and equivalent benefit or advantage: the latter proceeds upon the *quid pro quo*, and unless service be rendered nothing is to be paid."). The Valdez tax, of course, "is not one for specific services to the vessels." Pet. App. 29a; see pp. 23-25, *infra*.

Second, a State need not exclude vessels from a generally applicable *ad valorem* property tax, because a *nondiscriminatory* tax is not "a tax upon the boat as an instrument of navigation." *Perry* v. *Torrence*, 8 Ohio 521, 524 (1838) (in bank); see *Transp. Co.* v. *Wheeling*, 99 U.S. 273, 283 (1879). But "the prohibition" of the Tonnage Clause *does* "come[] into play where [the vessels] *are not taxed in the same manner as the other property of the citizens.*" *Wheeling*, 99 U.S. at 284 (emphasis added). See also *The Passenger Cases*, 48 U.S. (7 How.) 283, 402 (1849) ("A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce *the same as other property owned by its citizens.*") (emphasis added). This prohibition of discriminatory property taxes on vessels is an essential element of the rule. If property taxes that fall only on vessels making use of a jurisdiction's docks are permissible, it would be an easy matter for States to disguise what really are "tax[es] [on] the privilege of access by vessels to their harbors" (*Clyde Mallory Lines*, 296 U.S. at 264-265) simply by tweaking the label applied to the charge – thus frustrating the policy of the Tonnage Clause.[6]

[6] In its opposition to certiorari, Valdez contended that the Court's invocation of a nondiscrimination requirement in *Wheeling* resulted from its misreading of an 1877 treatise by William Burroughs cited by the Court in that opinion. Opp. 12. But the Court correctly interpreted the Burroughs treatise. Burroughs explained that the Tonnage Clause "was designed to enable the government to give uniformity to the commerce of the States" and that, to accomplish this end, "it was not necessary to prohibit the States from taxing vessels as property *in the same manner as other property of the State is taxed.*" JA 80 (emphasis added). A property tax that discriminates against

The Court's emphasis that property taxes in this context must be nondiscriminatory – a criterion repeated five times in *Wheeling*[7] – is consistent not just with the purpose of the Tonnage Clause but also with the practice of the States in the generation after adoption of the Constitution. See, *e.g.*, *Battle* v. *Corp. of Mobile*, 9 Ala. 234, 236, 238 (1846) ("[I]t may be conceded[] that the State has relinquished the right to levy a specific tax on vessels navigating her rivers. * * * Upon the whole, we think it clear, that this tax, *not being a specific one, applicable alone to steamboats, but a general one, extending to all personal estate*, is free from constitutional objection.") (emphasis added); *Howell* v. *State*, 3 Gill 14, 16, 24 (Md. 1845) (rejecting a Tonnage Clause challenge to

vessels used in commerce, however, results in the vessels not being taxed "in the same manner as other property of the State"; allowing States to impose such a discriminatory tax – and giving them the concomitant power to regulate commerce through that tax – would prevent the United States from "giv[ing] uniformity" to commerce among the States. The point is proved by the *Wheeling* Court's citation (99 U.S. at 284), along with the Burroughs treatise, to *Johnson* v. *Drummond*, 61 Va. (20 Gratt.) 419 (1871). In that case, the court rejected an attempt to characterize a levy as a legitimate property tax because it discriminated against vessels that carried oysters. *Id.* at 426. As a result, the court concluded that the levy was an unconstitutional tax on a vessel "as a vehicle of conveyance." *Id.* at 425.

[7] See *Wheeling*, 99 U.S. at 282 (a state "may tax a ship or other vessel used in commerce the same as other property owned by its citizens"); *ibid.* ("the owners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property"); *id.* at 283 (vessels "may be taxed like other property"); *id.* at 284 ("the prohibition only comes into play where [vessels] are not taxed in the same manner as the other property of the citizens"); *ibid.* ("the taxes in this case were levied against the owners as property, upon a valuation as in respect to all other personal property").

a tax on "all real and personal property in the State" because vessels were "taxed rateably, with other property produced within the State"). We are not aware of any decision by any court during that period – or, indeed, *ever* – upholding a tax that discriminated as the Valdez tax does.[8]

4. The operation of the Tonnage Clause is further confirmed by reference to the Import-Export Clause, which the Tonnage Clause was designed to complement. See *Keokuk*, 95 U.S. at 87 ("What was intended by the provisions of the [Import-Export Clause] was to protect the freedom of commerce, and nothing more. The prohibition of a duty of tonnage should, therefore, be construed so as to carry out that intent."); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824) ("'A duty of tonnage' is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also.").

In the context of the Import-Export Clause, the Court had an opportunity to speak directly to the nondiscrimination principle in *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 283-284 (1976), and *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978). In *Michelin Tire*, the Court reconsidered the precedent of *Low* v. *Aus-*

[8] When *Wheeling* and *The Passenger Cases* were decided, the home-port doctrine allowed movable property to be taxed only by the domiciliary State. See *Hays* v. *Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1855); p. 8, *supra*. Thus, the discrimination proscribed by those cases necessarily is discrimination between vessels and other forms of property. The home-port doctrine has since yielded to a rule of fair apportionment, see, *e.g.*, *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 21-26 (1891), such that it is now possible for a vessel tax also to discriminate between domestic and foreign vessels.

tin, 80 U.S. (13 Wall.) 29 (1872), which prohibited States from applying any property taxes to imports until they became "incorporated and mixed up with the mass of property in the country." *Id.* at 33. The Court overruled *Low* as to "nondiscriminatory ad valorem property taxes," which it concluded would not offend the objectives of the Import-Export Clause, including the need to ensure that seaboard States "were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." 423 U.S. at 285-286.

That *Michelin Tire* was distinguishing between "discriminatory" and "nondiscriminatory" *ad valorem* property taxes is unmistakable. The Court repeated the nondiscrimination requirement at least 13 times (see 423 U.S. at 279-302) and specifically noted, in reference both to *ad valorem* property taxes and to other types of levies imposed on imported goods after their entry into the United States:

> Of course, discriminatory taxation in such circumstances is not inconceivable. For example, a State could pass a law which only taxed the retail sale of imported goods, while the retail sale of domestic goods was not taxed. Such a tax, even though operating after an "initial sale" of the imports would, of course, be invalidated as a discriminatory imposition that was, in practical effect, an impost.

Id. at 288 n.7. Additionally, while overruling the *Low* rule as to nondiscriminatory *ad valorem* taxation, the Court left undisturbed *Cook* v. *Pennsylvania*, 97 U.S. 566 (1878), which provides that a tax that applies a more favorable rate to domestic arti-

cles than to imported goods violates the Import-Export Clause.

In *Washington Stevedoring*, the Court extended the rule of *Michelin Tire* to the treatment of exports. 435 U.S. at 758. In so doing, the Court acknowledged that, "[t]o the extent that the Import-Export Clause was intended to preserve interstate harmony, * * * four safeguards will vindicate the policy": "Fair taxation will be assured by the prohibition on discrimination and the requirements of apportionment, nexus, and reasonable relationship between tax and benefits." *Id.* at 761.

Indeed, the Court's early emphasis on the non-discrimination principle under the Tonnage Clause anticipated not only its Import-Export Clause rulings, but also its modern Commerce Clause doctrine. As it has under the Import-Export Clause, when addressing constitutional limits on state taxing authority under the Commerce Clause the Court has come to reject formalistic rules and has emphasized the practical impact of the challenged levies on the taxpayer, while also recognizing that interstate businesses must pay their own way – so long as they are not subjected to discriminatory treatment. Much like the Import-Export and Tonnage Clauses, the Commerce Clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves." 3 Farrand, *supra*, at 478 (J. Madison). As a consequence, although "interstate commerce may be required to share equally with intrastate commerce the cost" of local government (*Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 647 (1981)), "[i]f a restriction on commerce is discriminatory, it is virtually *per se* invalid" (*Or. Waste Sys.*,

Inc. v. *Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). Thus, each of the constitutional provisions designed to limit the dangers of interstate economic rivalry – the Commerce, Import-Export, and Tonnage Clauses – embodies the same anti-discrimination principle.[9]

B. The Valdez Tax Discriminates Against Vessels Making Use Of The City's Port.

1. The Valdez levy is flatly inconsistent with this nondiscrimination requirement. It does not tax vessels "in the same manner as the other property of the citizens." *Wheeling*, 99 U.S. at 284. To the contrary, "large vessels, and only large vessels, are the only personal property taxed by the City" (Pet. App. 43a), and the tax was then further gerrymandered to exclude vessels used primarily in commercial fishing, most of which are local. In fact, the tax plainly seems to have been drafted to apply only to ocean-going tankers, a point that both courts below recognized in acknowledging that the tax was adopted in response to "a serious erosion of the city's tax base, much of which is oil- and gas-related property." Pet. App. 3a; see Pet. App. 38a; see also Valdez Resolution No. 00-15 (Pet. App. 54a) ("funds received from an ad valorem tax on vessels over 95 feet in length [are] intended to offset the fiscal instability resulting

[9] The Alaska Supreme Court concluded that "the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property," citing *state* law that authorizes municipalities to exempt some types of personal property from ad valorem property taxes. Pet. App. 20a. But this observation is beside the point. *Wheeling* and *Michelin Tire* indicate that the *U.S. Constitution* prohibits the imposition of discriminatory property taxes on vessels. State law cannot authorize a violation of the federal constitutional requirement.

from the continued decline in the Valdez tax base and to be able to obtain fiscal stability").[10]

2. Moreover, the tax was not designed to charge for services uniquely provided to tankers; the trial court "found that the tax is not one for specific services to the vessels, such as docking fees or 'wharfage'" (Pet. App. 29a), and the Valdez City Council made explicit that the tax was a general revenue measure that would "allow for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities." Valdez Resolution No. 00-15 (Pet. App. 54a); see also Pet. App. 19a-20a. In its opposition to certiorari, Valdez contended that the availability of these services to vessels somehow satisfies the Tonnage Clause. See Opp. 8-10. But obviously, a tax that is placed in the

[10] The authority relied upon by the Alaska Supreme Court to justify the Valdez tax does not support its holding. The court (Pet. App. 19a) principally invoked the California Supreme Court's decision in *Japan Line, Ltd.* v. *County of Los Angeles*, 571 P.2d 254 (Cal. 1977), which rejected a Tonnage Clause challenge to "nondiscriminatory ad valorem property taxes." *Id.* at 258. But even setting aside that the California court's decision in *Japan Line* was *reversed* on Commerce Clause grounds by this Court – which expressly declined to reach the Tonnage Clause question in light of that disposition (see 441 U.S. at 439 n.3) – the reasoning of the California Supreme Court does not support the decision below. In *Japan Line*, the tax at issue was a *nondiscriminatory* general tax, not directed at shipping containers in particular. See *id.* at 437; see also *id.* at 445 (California levy was "an ad valorem tax of general application"). The decision therefore simply did not address the consideration that is crucial in this case: that the challenged tax singles out ocean-going vessels for unfavorable treatment. The same distinction applies to the tax upheld by the Vermont Supreme Court in *Bigelow* v. *Dep't of Taxes*, 652 A.2d 985, 987-988 (Vt. 1994), which also was invoked by the Alaska court (Pet. App. 18a n.43).

City's general fund is not at all like a wharfage fee or similar levy imposed as a *quid pro quo* for particular services rendered.[11] To the contrary, Valdez sought simply to raise general revenue, which is the core concern of the Tonnage Clause. See *Gibbons*, 22 U.S. (9 Wheat.) at 202 ("the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed"); *State* v. *Turnbaugh*, 705 A.2d 530, 532 (R.I. 1997) (finding vessel tax unconstitutional because the funds were "entirely subject to being used as a general-revenue measure and not merely for the purpose of providing services to boats, boaters, and navigational improvements").

It is notable that an early Congress that contained many of the Framers of the Constitution believed that a tax for the purpose of funding a hospital *was* subject to the Tonnage Clause. In 1806, Congress approved a tonnage tax imposed in South Carolina for the purpose of "erecting and supporting an hospital in the vicinity of Charleston for the reception and relief of sick and disabled seamen." Act of Dec. 21, 1804, 2 Acts of the Gen. Ass'y of S.C. 553, 555 (seeking the consent of Congress to levy the tonnage tax); Act of Mar. 28, 1806, Ch. 17, 2 Stat. 357 (granting consent);[12] see also *Alexander*, 34 S.C.L. (3

[11] The crews of commercial fishing vessels enjoy access to the hospital, school, and city infrastructure tax-free, and vessels that use only the City's public docks and pay for dockage services are also exempted from any obligation to "offset the fiscal instability resulting from the continued decline in the Valdez tax base." Valdez Resolution No. 00-15 (Pet. App. 54a); Valdez City Code § 3.12.020(A)(1) (Pet. App. 45a).

[12] These Acts are reproduced in the Addendum to this brief.

Strob.) at 599. That this early Congress believed its approval was necessary to allow imposition of the Charleston tax – a levy that, if anything, was more closely related to the object of the taxation than is the one imposed by Valdez – confirms that such a levy falls under the Tonnage Clause.

3. Finally, the Valdez vessel tax implicates the concerns of interstate rivalry that led to the adoption of the Import-Export and Tonnage Clauses. Like "discriminatory state taxation against imported goods as imports," the discriminatory taxation by Valdez of large vessels – virtually all of which are used to transport products for use in other States – operates as "a form of tribute by seaboard States to the disadvantage of the other States." *Michelin Tire*, 423 U.S. at 286. Similarly, by taxing large but not small vessels, and by taxing oil tankers but not fishing schooners, Valdez is regulating interstate commerce and infringing upon federal power. Cf. *id.* at 286 ("nondiscriminatory property taxation * * * cannot be applied selectively to encourage or discourage any importation in a manner inconsistent with federal regulation"); see also JA 48 (explaining that commercial fishing vessels were exempted from the vessel tax because "[t]hese industries were thought to contribute to the City economy in other ways").

In this respect, the Valdez vessel tax is a close Tonnage Clause equivalent of the hypothetical discriminatory tax on imports that the Court in *Michelin Tire* declared impermissible under the Import-Export Clause. The levy purports to be a property tax rather than a tonnage duty, but the reality is that it is uniquely imposed on vessels that dock in Valdez. The property tax label, and the availability of municipal services to vessels that dock in Valdez in the same manner as those services are

available to residents and other visitors to the City who are untaxed, should not save such a levy.[13]

II. THE VALDEZ APPORTIONMENT FORMULA TAXES EXTRATERRITORIAL PROPERTY VALUES AND CREATES A CLEAR RISK OF DUPLICATIVE TAXATION.

The Valdez tax also violates the Due Process and Commerce Clauses because it employs an apportionment formula that artificially inflates the fraction of a ship's total value that is taxed by the City. The numerator of the formula's apportionment ratio is the number of days per year that a ship spends in Valdez. The denominator, however, is *not* the number of days in a calendar year. Rather, Valdez subtracts from what would otherwise be a 365-day denominator (a) the number of days that petitioner's tankers spend plying the high seas and therefore are not physically present in *any* tax situs; and (b) "periods when a vessel is tied up because of strikes or withheld from the Alaska service for repairs." Pet. App. 55a. The direct and inevitable effect of these exclusions is that Valdez taxes a share of each ship's value that far exceeds its actual presence within the City's territorial jurisdiction. This approach offends the Constitution for two closely related reasons.

[13] It does not matter that the Valdez tax does not, in terms, purport to be on the "privilege" of docking in the City. Under the Commerce Clause, the Court has refused to "'attach[] constitutional significance to [such] a semantic difference,'" instead "emphasiz[ing] the importance of looking past 'the formal language of the tax statute [to] its practical affect.'" *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 285, 279 (1977)).

First, this formula arrogates to Valdez the authority to tax property, belonging to a nondomiciliary, that does not lie within the City's territorial jurisdiction. By taxing, for example, 20% of a vessel's value when the ship was in Valdez for only 10% of the tax year, the City necessarily stakes a tax claim on periods of the year when the ship was elsewhere and therefore not subject to the City's taxing authority at all. There should be no doubt that this formula yields taxation that is not "fairly apportioned" (*Complete Auto*, 430 U.S. at 279), because there is no "rational relationship" between the value *attributed* to the taxing State and the *actual* in-state value. *Mobil Oil Corp.* v. *Comm'r of Taxes*, 445 U.S. 425, 437 (1980).

This same assertion of extraterritorial taxing authority gives rise to a second constitutional infirmity. This Court's holdings demonstrate that the State of the owner's domicile possesses authority to tax the full value of movable personalty except for the portion of the year when that property has a tax situs in another State. This means that petitioner's domicile may tax petitioner's tankers for the time when they are on the high seas. Similarly, a jurisdiction that has acquired taxing authority over property may exercise that authority while the property remains within the jurisdiction's borders due to a labor stoppage or for repairs. But Valdez, by its distortive apportionment ratio, has claimed the right to tax petitioner's vessels during these same periods and thus has created the prospect of duplicative taxation. Because the Constitution precludes a State from "imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State, not merely on such property as *is* subjected to tax elsewhere" (*Central R.R. Co. of Pa.* v. *Pennsylvania*, 370

U.S. 607, 614 (1962)), the Valdez apportionment formula is invalid regardless of the tax policy of petitioner's domicile. See *Mobil Oil*, 445 U.S. at 444.

A. The Valdez Formula Taxes Extraterritorial Values.

The structure of Valdez's taxing formula establishes its constitutional infirmity. By design, this formula inflates the proportion of a ship's value that is subject to taxation in Valdez by excluding from its denominator *all time* that petitioner's tankers spend traveling on the high seas between Valdez and ports in California, Washington and Hawaii, and *all time* that these ships spend out of service for periodic repair work or because of a strike. As a result of these exclusions, the denominator against which the ship's time in Valdez is measured regularly falls from 365 to 200, or 150, or even lower.

The Alaska Supreme Court casually dismissed petitioner's contention that this apportionment method was tantamount to taxing the vessels for days spent at sea or otherwise outside of Valdez. See Pet. App. 13a. But the truth of that statement is beyond dispute. In mathematical terms, excluding days spent on the high seas, repair days, and strike days from the apportionment denominator is *exactly the same* as adding a portion of those days to the numerator.

Take for example the illustration, employed by the Alaska Supreme Court, of a tanker that is in port in Valdez for 50 days during a year, and in port (for reasons other than for repairs or a strike) in any tax-

ing jurisdiction for a total of 150 days.[14] Under the Valdez formula, that tanker would be taxed by Valdez on 33.3% (50/150) of its assessed value. This would be so even though the City accepts that the tanker was *actually* present in Valdez for only about 13.7% (50/365) of the year. Or, to state the resulting distortion in another way, this ship would be taxed as if it had been present in Valdez for approximately 121 days of a full calendar year (33.2%) – 71 days more than it actually was in the City.

Other circumstances would produce tax assessments that depart even more radically from reality. Consider the example, first introduced in the petition, of a ship that spends one day per year in Valdez, one day in Long Beach, and the rest of the year on the high seas. That ship would be taxed by the City on 50% of its value under the Valdez formula – *i.e.*, as if it had spent 182.5 days in Valdez – even though the record relied upon by the city would show that the ship *actually* spent roughly 0.27% of the year in Valdez (1/365). Nor is this the most extreme example of how Valdez could use its apportionment formula to reach extraterritorial value. Imagine a ship that spent nine days in Valdez, just one day in Long Beach, and the rest of the year on the high seas, under repair, or in dock because of a strike. That ship would have spent less than 2.5% of the year in Valdez (9/365). But under the Valdez formula, its owner nonetheless would be taxed on an astonishing *90%* of the ship's full value – as if, despite all evidence to the contrary, the ship had been in Valdez for 328.5 days.

[14] This illustration is a realistic one. In 1999, for example, petitioner's vessel "Polar Spirit" spent 51 days in Valdez and 151 total days in port in a tax situs. See JA 26-27.

These examples serve to illustrate the mathematical effect of applying Valdez's "port time" formula. When even a single day is deducted from the ratio's denominator, the fractional value of the vessel deemed subject to tax in Valdez becomes larger than the fractional portion of the year that the ship actually spent in the City. As applied to petitioner's oceangoing tankers, some of which spent as many as 249 days on the high seas during the tax years at issue and none fewer than 91 (see JA 21-45), the inflationary effect is substantial. And the degree to which Valdez appropriates these extraterritorial days for itself is also a direct function of the apportionment ratio. Thus, in the example used by the Alaska Supreme Court, because the "Valdez days" to "port time" ratio is 1:3 (50:150), Valdez assigns to itself 1/3 of the days artificially excluded from the denominator (*i.e.*, roughly 71 of the 215 days that were excluded). In the second example, because the resulting ratio is 1:2, Valdez takes for itself 1/2 of the extraterritorial days (*i.e.*, 181.5 of the 363 days removed from the denominator). And in the final illustration, Valdez would take 90% of the 355 excluded days, taxing 319.5 days that the vessel spent outside the City's territorial jurisdiction.

B. The Due Process And Commerce Clauses Preclude Valdez From Taxing Property Of Non-Domiciliaries When That Property Lies Beyond Its Borders.

1. A state or local jurisdiction may not impose property taxes on extraterritorial values.

Valdez thus imposes a per-unit *ad valorem* property levy that taxes petitioner's vessels in a manner that is grossly disproportionate to their actual pres-

ence within city limits. It does so even though the City *knows* when each of those vessels is, and is not, in Valdez, and indeed employs precisely that data to calculate the tax due under the apportionment formula now in use. And it does so even though the City *knows* that, by the very nature of petitioner's business, petitioner's vessels will *always* spend much of the year at sea. This is not a situation where an inexact formula is used to capture approximate in-state value and misses the mark by an excusable measure due the imprecise nature of apportionment. It is, instead, a formula *designed* to tax extraterritorial value. Such an apportionment formula is unconstitutional.

"Established principles are not lacking in this much discussed area of the law." *Norfolk & W. Ry. Co.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968). On the one hand, "[i]t is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise." *Ibid.* On the other, "the Court has insisted for many years that a State is not entitled to tax tangible or intangible property that is unconnected with the State," and it has held that States may not "cast their tax burden upon property located beyond their borders." *Id.* at 324, 325. It thus is fundamental that "[t]he Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values.'" *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1502 (2008); accord *Asarco Inc.* v. *Idaho State Tax Comm'n*, 458 U.S. 307, 315 (1982).

To accommodate these rules, under both the Commerce and the Due Process Clauses the values subject to a state or local tax, including a property tax, must be apportioned among all jurisdictions in which the property has acquired tax situs, which is

defined for property tax purposes as existing when there has been "habitual employment [of the property] within the jurisdiction." *Central Railroad*, 370 U.S. at 613.[15] Although this requirement was developed in cases involving railroad rolling stock, it has been applied to virtually all movable property, including vessels. See, *e.g.*, *Japan Line*, 441 U.S. at 442; *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949); *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18 (1891).[16] And it is settled that property that has not acquired *any* tax situs elsewhere may be taxed at its full value by the domicile of the owner, even if the property spends a portion of the tax year outside the domicile's jurisdiction; such a levy is not

[15] The Court applies a four-part test under the Commerce Clause that mirrors the one applicable under the Import-Export Clause (see p. 21, *supra*): a state tax must (1) be applied to an activity with a substantial nexus to the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to services provided to the taxpayer by the State. See *Complete Auto*, 430 U.S. at 279. Insofar as is relevant in this case, however, the apportionment requirements of the Commerce and Due Process Clauses substantially overlap. See generally *MeadWestvaco Corp.*, 128 S. Ct. at 1505.

[16] The one exception has been oceangoing vessels; the Court has never expressly repudiated the home port doctrine as it applies to such vessels, and therefore has not squarely held that such vessels may be taxed by any jurisdiction other than their State of domicile. See *Japan Line*, 441 U.S. at 442 ("In discarding the 'home port' theory for the theory of apportionment, * * * the Court consistently has distinguished the case of oceangoing vessels"); *id.* at 443-444 ("There is no need in this case to decide currently the broad proposition whether mere use of international routes is enough, under the 'home port doctrine,' to render an instrumentality immune from tax in a nondomiciliary State."). In this case, however, petitioner has not contended that the home port doctrine applies.

an improper extraterritorial tax because it reflects the understanding that the domicile State may impose a tax in return for providing the property's owner unique "'opportunities, benefits, or protection.'" *Central Railroad*, 370 U.S. at 612 (citation omitted). See *Nw. Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 297-298 (1944); *Johnson Oil Ref. Co.* v. *Oklahoma*, 290 U.S. 158, 161 (1933). Valdez has not challenged that rule.

The question here is how these principles apply to the apportionment of taxes on property that may be taxed by more than one jurisdiction but has no identifiable tax situs for a portion of the year. Specifically, it is whether the domicile State has the right to tax *all* the value for periods when there is no established tax situs (as we maintain), or whether non-domicile jurisdictions in which the property has acquired tax situs may tax a portion of the value attributable to periods when the property had no specific situs (as Valdez asserts and the Alaska Supreme Court held). The answer to that question is apparent: the Valdez formula is impermissible because it taxes extraterritorial values without the unique justification that States of domicile have for doing so.

2. Apportionment of a personal property tax must rest on an assessment intended to measure the taxable object's actual proportionate presence within the taxing jurisdiction.

a. This Court has long made clear that where the property of non-domiciliaries is concerned, "the power to tax is predicated upon jurisdiction of the property." *United States* v. *Allegheny County*, 322 U.S. 174, 184 (1944). Indeed, the Court has held it "*essential* to the validity of a tax that the property

shall be within the territorial jurisdiction of the taxing power * * * [and] no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a state is not a subject upon which her taxing power can be legitimately exercised." *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194, 204 (1905) (emphasis added). See also *Norfolk & W. Ry.*, 390 U.S. at 325 (extraterritorial taxation "imposes an illegitimate restraint on interstate commerce and * * * denies to the taxpayer the process that is his due"); *R.I. Hosp. Trust Co.* v. *Doughton*, 270 U.S. 69, 80 (1926) (citing cases) ("It goes without saying that a state may not tax property which is not within its territorial jurisdiction.").

These principles yield none of their force where, as here, the property at issue is an instrumentality of interstate commerce that has acquired a tax situs in more than one jurisdiction. To the contrary, the Court has frequently applied the rule against extraterritorial taxation in examining the validity of State property taxes levied upon movable railroad equipment. See, *e.g.*, *Norfolk & W. Ry.*, 390 U.S. at 317; *Union Tank Line Co.* v. *Wright*, 249 U.S. 275 (1919); *Fargo* v. *Hart*, 193 U.S. 490 (1904). The inquiry in such cases is aimed at determining *how much* of the property's value is present in, and therefore subject to tax in, each State.

In *Union Tank Line*, for example, Georgia sought to tax rail cars owned by a New Jersey corporation by using an apportionment method that did not correlate to the actual presence of the corporation's property within the State – although the extent of the rail cars' presence in Georgia was both directly ascertainable and actually known. Georgia instead proposed to calculate the value of the corporation's

intra-state property (which consisted *only* of rail cars) by using a ratio that depended entirely on the mileage of *railroad track* (owned by *other* corporations) on which the taxpayer's rail cars ran in Georgia and elsewhere; under this formula, "[t]he valuation to be assigned to Georgia [would] be in the same proportion to the valuation for the entire company as the mileage [of track] in Georgia bears to the entire mileage everywhere." 249 U.S. at 278.

The Court held that this methodology could not be employed to determine the in-state value of the petitioner's rail cars, recognizing that "[r]eal values – the essential aim – of property within a state cannot be ascertained with even approximate accuracy by such process; the rule adopted has no necessary relation thereto." *Id.* at 283. And the Court went further still. It indicated that in view of the unchallenged facts, the quantum of value subject to taxation in Georgia was clear: "Fifty-seven was the average number of cars within Georgia during 1913, and each had a 'true' value of $830. *Thus, the total there subject to taxation amounted to $47,310.*" *Ibid.* (emphasis added). Accord *Johnson Oil*, 290 U.S. at 163 ("Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were to be found physically present within the state.").

Some 50 years later, the Court confronted a similar question in *Norfolk & Western Railway* and returned an identical answer. At issue there was a Virginia rail corporation's contention that a Missouri property tax assessment was unconstitutional because it, "in effect reached property not located in Missouri." 390 U.S. at 320. Here, too, a "rigid appli-

cation" of a mileage-based apportionment formula had yielded a tax apportionment that bore no relation to reality – Missouri had postulated that over 8% of the petitioner's rail stock was located within its borders, whereas the evidence (undisputed by the State) showed that only about 3% of that property was actually in Missouri on any given day. *Id.* at 326-328. This demonstrated discrepancy between actual presence and the State's tax assessment led the Court to strike down the Missouri assessment; the Constitution, the Court held, does not "tolerate any result, however distorted, just because it is the product of a convenient mathematical formula which, in most situations, may produce a tolerable product." *Id.* at 327.

With respect to movable and immovable property alike, the governing rule is thus clear:

> [t]he taxation of property not located in the taxing State is constitutionally invalid * * *. A State will not be permitted, under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to "project the taxing power of the state plainly beyond its borders."

Norfolk & W. Ry., 390 U.S. at 325 (quoting *Nashville, Chattanooga & St. L. Ry.* v. *Browning*, 310 U.S. 362, 365 (1940)). See also *Union Tank Line*, 249 U.S. at 286 ("under *no formula* can a state tax things wholly beyond its jurisdiction") (emphasis added).

b. These settled principles give definition to what it means for a tax on personal property that moves in interstate commerce to be "fairly apportioned" within the meaning of *Complete Auto*. However structured, an apportionment formula is valid only if its aim, as well as its approximate result, is to tax property on

the basis of its actual proportionate presence within the taxing jurisdiction. See *Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 121 (1920) (state income tax formula upheld because apportionment method "reached, and was meant to reach, only the profits earned within the state"); *Moorman Mfg. Co.* v. *Bair*, 437 U.S. 267, 274 (1978) (same) (quoting *Underwood*); *Wallace* v. *Hines*, 253 U.S. 66, 69 (1920) (striking down facially valid apportionment formula that, in view of the factual record, plainly taxed extraterritorial property owned by the plaintiff railroads).

We do not suggest that the Constitution permits only one method of measuring actual presence. Compare *Japan Line*, 441 U.S. at 444-445 & n.8 (stating that container tax could be presumed "'fairly apportioned,' since it is levied only on the containers' 'average presence' in California, * * * *i.e.*, the time each container spends in the State per year") with *Goldberg* v. *Sweet*, 488 U.S. 252, 264 (1988) (noting Court's general approval of mileage-based apportionment formulas in cases involving "the movement of large physical objects over identifiable routes, where it was practicable to keep track of the distance actually traveled within the taxing State"). What we do contend, and what this Court's precedents amply demonstrate, is that the Constitution does not tolerate the use of an apportionment formula that ignores undisputed realities about the actual location of a taxpayer's property. "That would be taxing property outside of the state under a pretense." *Fargo*, 193 U.S. at 500.

The rationales supporting that longstanding prohibition are compelling. By definition, an apportionment formula that overstates the percentage of the taxpayer's property that is present in the taxing

State results in the taxation of extraterritorial values. And if States and localities were permitted to impose a tax on some basis other than a formula designed to measure the actual local presence of property, they could readily shift a disproportionate share of the local taxing burden onto non-local interests. They could do this by raising the effective tax rate imposed on property that is owned by non-locals and employed in interstate commerce, even while holding the facial tax rate even across the board.

By way of illustration, imagine two ships, one that spends the entire year in Valdez, the other that spends 50 days per year in the City and 150 days total in all ports (other than for repair or due to a strike). Assume as well that each ship has an assessed value of $10 million and is subject to a 2% property tax rate. The first ship would pay $200,000 in tax – roughly $548 per day – for the benefits and protections afforded by Valdez over the course of the full year. The second ship, owned by a non-domiciliary, used in interstate commerce, and therefore frequently absent from Valdez, would pay far more per day. Under the Valdez formula, the vessel would pay tax on 1/3 of its assessed value and would thus owe $66,667. This would translate to a tax bill of over $1,333 per day spent in Valdez, in return for *precisely* the same benefits and protections as those afforded to the local ship. No valid conception of due process, or of the national free trade idea that underlies the Commerce Clause (see *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 539 (1949)), permits such a disproportionate share of a local tax burden to be shunted onto instrumentalities of interstate commerce in this manner.

c. The Alaska Supreme Court nevertheless saw "no reason why the days at sea outside the jurisdic-

tion of any taxing authority should be included in the denominator of the [apportionment] fraction." Pet. App. 13a. But the reason is obvious: the inexorable logic of the mathematics establishes that excluding those days (as well as repair and strike days while the vessels are outside Alaska) means that Valdez is manipulating the operation of the apportionment formula so that it taxes for periods when the vessel is outside the City. Simply because a jurisdiction has sufficient contacts with property to support the imposition of *some* tax on it does not justify the imposition of a tax that does not fairly reflect the time *actually spent* in the jurisdiction.

This conclusion also follows from the Court's historic treatment of the authority of the property owner's domicile. The Court has held that property that has no tax situs for a portion of the year should not "escape [property] taxation entirely" for that period. *Central Railroad*, 370 U.S. at 617. This means that taxing authority over such property for the period when it is outside a tax situs must either be (1) allocated to the domicile or (2) apportioned proportionately between the domicile and those non-domicile jurisdictions that have acquired tax situs for a portion of the year. As between these two choices, Valdez has chosen the latter, but the former is compelled by this Court's decisions. Allowing the domicile to tax for the "no-tax-situs" period accords with the traditional and, so far as we are aware, unchallenged authority of the domicile to tax at *full* value property that has not acquired *any* actual situs elsewhere. See pp. 32-33, *supra*. It follows from that same understanding that the State of domicile possesses authority to tax the *portion* of the property's value that is attributable to time spent outside any tax situs, because it is only the domicile State that

provides the benefits and protections that justify taxation of the owner's absent property.

3. The record evidence shows that the Valdez formula has, in fact, produced malapportioned taxation.

The Valdez apportionment formula thus necessarily yields an unconstitutional result. And not surprisingly, just as in *Union Tank Line* and *Norfolk & Western Railway*, the undisputed factual record demonstrates that the formula has produced assessments for the years at issue, 2000 to 2003, that are clearly excessive in relation to the subject vessels' actual proportionate presence in Valdez. In the interest of brevity we focus here on a single vessel, petitioner's ship "Polar Alaska," although the City's apportionment scheme has had a similarly disproportionate effect on the tax assessment of every one of petitioner's tankers.

Polar Alaska spent 53 days in Valdez during 1999 and 195 days during that year in a status discounted by the apportionment formula (174 days on the high seas and 21 under repair). JA 21-22. Polar Alaska thus spent 14.5% of the tax year in Valdez, but was taxed by the City on 31.1% of its full assessed value. In 2000, Polar Alaska similarly spent 52 days in Valdez and 174 days outside of any tax situs. JA 32. The vessel thus spent 14.2% percent of this leap year in Valdez, but was taxed as if it had spent 27.2% of the year within city limits. A similar result accrued in 2001, when Polar Alaska spent 48 days in Valdez and a total of 179 days outside of a tax situs. JA 36. Again, the 25.8% assessment produced by the Valdez apportionment formula dwarfed the 13.2% of the year that Polar Alaska was actually present in Valdez. And in 2002, Polar Alaska spent

40 days in Valdez (just under 11% of the year) and a total of 226 days in all tax situs jurisdictions (although 28 of those non-Valdez port days were spent in repair outside Alaska and therefore were excluded from the apportionment denominator). JA 41. The vessel was thus subject to tax on 20.2% of its value.

It bears emphasis that there is no dispute as to when Polar Alaska, or any of petitioner's vessels, actually was in Valdez in any year. Nor is there any issue as to how to determine the full value of any individual ship. There is simply a gross discrepancy between the amount of time that these vessels spent in Valdez in any given year and the proportionate share of value that Valdez taxed under its formula. This will always be the case because it is the nature of an oil tanker's business to spend a portion of its time – necessarily a substantial portion – on the high seas. The Valdez tax therefore is unfairly apportioned and cannot be sustained even if it survives the Tonnage Clause challenge.

C. The Valdez Formula Subjects Petitioner's Property To An Impermissible Risk Of Duplicative Taxation.

Even if the Constitution does not otherwise prohibit Valdez from taxing a ship, owned by a Texas or California corporation, for periods the ship spends outside the City's jurisdiction, the prohibition against potentially duplicative taxation would still require invalidation of the Valdez apportionment formula. As demonstrated above, the Valdez formula effectively imposes tax on petitioner's vessels for periods when they are on the high seas or in some other port for repair (or because of labor unrest). But other jurisdictions plainly are entitled to levy property tax on the vessels during these same periods.

Accordingly, the Valdez tax gives rise to a risk that the vessels will be subjected to duplicative taxation.

1. A domicile may tax movable property for periods when the property has no tax situs.

a. As we note above, the Court in *Central Railroad* drew on decades of precedent to hold that the Constitution does not "confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's borders." 370 U.S. at 612 (citing, *inter alia*, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194 (1905), *Johnson Oil*, 290 U.S. at 161). Rather, so long as the taxpayer has not shown that its property has acquired a tax situs in another jurisdiction for the period subject to tax, the domicile retains the power to tax the property "to its full value," including time spent moving *outside* the domicile State. *Central Railroad*, 370 U.S. at 612. See also *id.* at 613 (emphasis added) ("the burden is on the taxpayer who contends that *some portion* of its total assets are beyond the reach of the taxing power of its domicile to prove that the same property may be similarly taxed in another jurisdiction"). Valdez's view that it also may tax petitioner's vessels for a portion of the time that they spend on the high seas and outside of any tax situs therefore means that it is asserting the authority to tax values already subject to tax by petitioner's domicile. Because, as we also note above, a tax is "invalid even if it creates only a risk of duplicative taxation" (Pet. App. 11a, citing *Central Railroad*, 370 U.S. at 614), the Valdez apportionment formula cannot stand.

The Alaska Supreme Court acknowledged that a tax must be invalidated "even if it creates only a risk of duplicative taxation" (Pet. App. 11a), but it found no such danger here because it believed that this Court's decision in *Japan Line* had effectively abrogated the special authority of domicile States recognized in *Central Railroad*. See Pet. App. 11a-12a. It reasoned that the domicile's historic authority to tax property for periods when the property is not physically present in the domicile is traceable to the home port doctrine. But it concluded that "the Supreme Court in *Japan Line* * * * recognized that the home port doctrine has yielded to a rule of fair apportionment among situs states." *Ibid.* (citing *Japan Line*, 441 U.S. at 442). The Alaska court added that "[m]odern precedent and the repudiation of the home port doctrine in *Japan Line*, 441 U.S. at 443, suggest that a domicile possesses no such expansive powers" – *i.e.*, no more power than any other tax situs jurisdiction – to tax vessels for time spent on the high seas. Pet. App. 13a n.26. The court therefore found that petitioner's "view of a domicile's ability to assert an extraterritorial tax conflicts with the tenor of *Japan Line*." *Ibid.* And if that is so, the court concluded, there is no danger of unconstitutional duplicative taxation here.

The Alaska Supreme Court's ruling, then, turns on the notions that (1) the domicile's special taxing authority derives from the home port doctrine, and (2) *Japan Line* worked what might be called a sea change in Commerce Clause analysis by not only repudiating the home port doctrine but also by retiring entirely the domicile preference. See Pet. App. 13a n.26. But that analysis is wrong on both points and reflects a plain misreading of this Court's decisions: *Japan Line* neither held nor hinted that domicile ju-

risdictions have been deprived of *all* power to tax property that lies outside their borders. Indeed, that issue (which would have required reconsideration of a long line of decisions by this Court – not just *Central Railroad*) was not presented at all in *Japan Line*.

b. What *was* at stake in *Japan Line* was the validity of a generally applicable apportioned municipal tax, as applied by a non-domiciliary jurisdiction to shipping containers that principally moved in foreign commerce. In relevant part, the taxpayer asserted that the home port doctrine *completely* shielded these containers, which were domiciled in Japan, from state taxation in the United States. See Brief for Appellants at 23-27, *Japan Line*, 441 U.S. 434 (No. 77-1378). The taxing city (Los Angeles) disagreed, but argued only that it was entitled to tax the containers for the portion of the time they were within the City's borders. See Brief for Appellees at 17, *Japan Line*, 441 U.S. 434 (No. 77-1378) (describing the levy at issue as a "property tax, based upon the value of property continuously or regularly in the jurisdiction and apportioned so as not to fall on a use outside the jurisdiction"). This Court, like the litigants, understood the apportionment formula at issue to reach only the containers' period of actual local presence in the taxing jurisdiction. See *Japan Line*, 441 U.S. at 443, 445 & n.8 (stating that the container tax could be presumed to be "'fairly apportioned,' since it is levied only on the containers' 'average presence' in California, * * * *i.e.*, the time each container spends in the State per year").

As a consequence, the Court had no occasion in *Japan Line* to consider whether the domicile lacked the authority to tax the vessels for the time they were traveling on the high seas. The case actually

was about something very different – whether the same standards that apply to apportionment for *interstate* commerce should apply to *foreign* commerce. The Court concluded in *Japan Line* that it should not "rehabilitate the 'home port doctrine'" to deal with the special issues presented by foreign commerce (see 441 U.S. at 443), but its solution was not to diminish the taxing power of the domiciliary jurisdiction over either foreign *or* domestic commerce. Instead, *Japan Line* held that Los Angeles could not assert *any* taxing authority over the property in question because the property's domicile, Japan, taxed its full value. *Id.* at 451. Los Angeles in that case occupied the position of Valdez in this one. It therefore would be perverse to read the decision as announcing a new constitutional doctrine that eliminates the residual rights of domiciliary States.[17]

c. Nor can a criticism of the *Central Railroad* rule be fairly discerned from the *Japan Line* Court's comments about the doubtful status of the "home port" doctrine in the domestic context. The "home port" doctrine and the rule describing the domicile's special, residual right to tax that was articulated in *Central Railroad* are hardly the same thing. To the contrary, the *Central Railroad* rule – that a domicile may *not* tax the full value of property that has ac-

[17] The Alaska court also purported to find support for its holding in *Braniff Airways, Inc.* v. *Neb. State Board of Equalization & Assessment*, 347 U.S. 590 (1954), and *Ott*. See Pet. App. 13a-15a. But *Braniff* simply did not address the reasonableness of the apportionment formula used by the State in that case, which was not challenged by the taxpayer. See 347 U.S. at 598. It therefore has no direct bearing here. And *Ott* says nothing at all to support the Alaska court's speculation that the decision meant to approve a non-domicile State's right to tax property for a portion of the time spent on the high seas.

quired a tax situs elsewhere, but *may* tax that property for periods when it has no tax situs – was itself a function of this Court's rejection of the ancient rule that *only* a domicile jurisdiction may tax personal property, wherever it is located. That rejection long pre-dated *Japan Line*. See, *e.g.*, *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 383-384 (1952). Accordingly, there was simply no basis for the Alaska Supreme Court's conclusion that *Central Railroad* had been displaced by the "tenor" of *Japan Line*. See Pet. App. 13a n.26.[18] Because petitioner's domicile accordingly

[18] In the years since *Japan Line*, leading commentators and numerous courts have concluded that the *Central Railroad* rule still governs. See, *e.g.*, Hellerstein & Hellerstein, *State Taxation* ¶ 4.12[2][d] (3d ed. 2000) ("Notwithstanding the erosion of the home port doctrine, it remains the law that the domiciliary state retains the power to tax the full value of instrumentalities of interstate commerce that have not acquired a tax situs in other states."); *ibid.* (domicile "plainly had power to tax the aircraft, except to the extent that it was taxable on an apportioned basis elsewhere"). See also *Ice Capades, Inc.* v. *County of Los Angeles*, 56 Cal. App. 3d 745, 755 (1976) (holding that for property of a California domiciliary having a taxable situs in New Jersey, but which spent much of the year in other jurisdictions without acquiring a tax situs, "a formula will be valid if it apportions to the County of Los Angeles * * * the proportion of the value of the property which the period of the tax year during which the property was not present in New Jersey bears to 365 days"); *East West Express, Inc.* v. *Collins*, 449 S.E.2d 599, 600 (Ga. 1994) ("ad valorem tax on property engaged in interstate commerce must be apportioned if the taxpayer bears its burden of demonstrating that its property has acquired a tax situs in another state"); *Appraisal Review Bd.* v. *Tex-Air Helicopters, Inc.*, 970 S.W.2d 530, 534 (Tex. 1998) ("If the facts show that property has a taxable situs in more than one state, the domiciliary state may not tax at full value"); *Jet Fleet Corp.* v. *Dallas County Appraisal Dist.*, 773 S.W.2d 744, 746 (Tex. Ct. App. 1988) ("the state of domicile has jurisdiction to tax the personal property of its corporations unless some measurable portion of

retains the authority to tax petitioner's vessels for periods while they are on the high seas, the danger of duplicative taxation requires invalidation of the Valdez apportionment formula.

2. A threat of duplicative taxation also flows from Valdez's taxation of vessels for periods they spend in other ports for repairs or because of a strike.

It is equally plain that a non-domicile jurisdiction that has acquired taxing authority over movable property by virtue of the property's local presence may levy on that property for periods that it remains within the jurisdiction "because of strikes or * * * for repairs." Pet. App. 55a. Routine presence for repairs has long been viewed as highly relevant in considering whether a jurisdiction has acquired taxing authority over the property of a non-domiciliary. See, *e.g.*, *In re Wheeling Steel Corp. Assessment Personal Prop. Brooke County 1951 Taxes*, 73 S.E.2d 644, 653-654 & Syllabus pt. 4 (W.Va. 1952) (marine equipment acquired tax situs in county where, *inter alia*, repairs to the equipment were routinely made); *Ott* v. *De Bardeleben Coal Corp.*, 166 F.2d 509, 512 (5th Cir. 1948) (noting the district court's holding that certain barges had acquired a tax situs in Louisiana, where, among other ties, the barges were regularly brought for repair), overruled on other grounds *sub nom. Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169 (1949). Indeed, the Alaska Supreme Court has itself

the property has acquired a permanent location or 'taxable situs' elsewhere."); *Ryder Truck Rental, Inc.* v. *County of Chesterfield*, 449 S.E.2d 813, 815 (Va. 1994) ("[A]pportionment is required only when property is subject to taxation, that is, has a tax situs, in another jurisdiction. Without a tax situs in another jurisdiction, a domiciliary state retains the authority to tax the full value of the property").

held, in an analogous circumstance, that the Constitution permits a locality to assess property tax upon seagoing vessels for the portion of the year in which they are marooned within the borough's territorial jurisdiction by pack ice. See *N. Slope Borough* v. *Puget Sound Tug & Barge*, 598 P.2d 924 (Alaska 1979). The recognition of this authority makes perfect sense: a vessel present for repairs or because of a strike still receives the benefit of police, fire, and other governmental services even though it is not operable at the time.

For this reason as well, Valdez's assertion of extraterritorial taxing authority creates a clear risk of duplicative taxation. The City excludes from the denominator of its apportionment formula days when vessels are in another port but undergoing repairs or idled by strike. By doing so, Valdez is effectively taxing vessels for a portion of the period that they are removed from the Alaska service and physically located in these *other* taxing jurisdictions. Because those jurisdictions may impose taxes for the same periods, the Valdez formula is insupportable.

* * * *

We note a final point related to the proper disposition of the case: we urge the Court to resolve the apportionment challenge even if it also holds the Valdez tax unconstitutional under the Tonnage Clause. Although such a Tonnage Clause ruling would invalidate the tax, it would leave open the possibility that Valdez could attempt to impose a new tax after eliminating the old one's discriminatory features. So long as the tax retained use of the existing apportionment formula, however, such a new levy would remain constitutionally flawed. Resolution of the apportionment challenge now accordingly would pro-

vide necessary guidance to the City and to other jurisdictions contemplating the imposition of similar taxes, while avoiding the prospect of substantial additional litigation regarding the City's tax and the possible return of an identical challenge to this Court. Because the issue is squarely before the Court and is being fully briefed by the parties, decision of the matter at this time is appropriate.

CONCLUSION

The judgment of the Alaska Supreme Court should be reversed.

Respectfully submitted.

RICHARD A. LEAVY
KWAKU A. AKOWUAH
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000
Counsel for Petitioner

JANUARY 2009

ADDENDUM

An ACT to authorize the City Council of Charleston, with the consent of Congress, to impose and levy a duty on the tonnage of ships and vessels, for the purpose therein mentioned.

WHEREAS the city council of Charleston, by their memorial to the legislature of this state, have, amongst other things, set forth that a proposition, authorized by the president of the United States, has been made to the said city council, to pay over to them the sum of fifteen thousand dollars for building a marine hospital in the vicinity of Charleston; and likewise to pay over to them all the hospital monies to be collected in the said port, on their taking upon themselves the direction of the said hospital, and defraying all expenses attending the same; which sums the said city council state to be altogether inadequate for the building and supporting the said hospital; but that for the reasons in their memorial mentioned, they have nevertheless agreed to assume the superintendance, direction and support of the said marine hospital, to accept the sums offered for building and supporting the same, and to rely on the legislature of this state to pass an act, and on congress to assent thereto, for authorizing the said city council to impose and levy a duty on the tonnage of ships and vessels to supply any deficiency which may arise in building and supporting the said hospital; and the said city council have therefore prayed that an act may be passed, authorizing them to impose and levy a duty, not exceeding six cents per ton, on ships and vessels, for the purpose aforesaid:

Be it therefore enacted by the honorable the Senate and House of Representatives, now met and sitting in general assembly, and by the authority of the

same, That whenever the consent of Congress shall be given to this act, the city council of Charleston shall be, and they are hereby authorized and empowered to impose and levy a duty, not exceeding six cents per ton, on all ships and vessels of the United States, which shall arrive and be entered in the port of Charleston, from any foreign port or place whatsoever; and a like duty, each time of entry, on all ships and vessels of the United States, not licensed, which shall arrive and be entered in the said port, with goods, wares and merchandize on board, from another state, other than an adjoining state, on the sea coast or on a navigable river; and also a like duty on all ships and vessels which shall be entered in the said port, having a license to trade between the different districts of the United States, or to carry on the bank or whale fisheries, whilst employed therein, to be paid on the said last mentioned ships and vessels, not more than once a year; which said duty shall be collected and paid in such way and manner as the city council of Charleston shall direct and appoint; and shall be appropriated by them in supplying any deficiency which may arise in erecting and supporting an hospital in the vicinity of Charleston for the reception and relief of sick and disabled seamen.

In the Senate House, the twenty-first Day of December, in the Year of our Lord one thousand eight hundred and four, and in the twenty-ninth Year of the Sovereignty and Independence of the United States of America.

JOHN WARD, *President of the Senate*
W.C. PINCKNEY, *Speaker of the House of Representatives.*

CHAP. XVII. – *An Act declaring the consent of Congress to an act of the state of South Carolina, passed on the twenty-first day of December, in the year one thousand eight hundred and four, so far as the same relates to authorizing the city council of Charleston to impose and collect a duty on the tonnage of vessels from foreign ports.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress be, and it is hereby granted and declared to the operation of an act of the general assembly of the state of South Carolina, passed the twenty-first day of December, in the year of our Lord one thousand eight hundred and four, intituled "An act to authorize the city council of Charleston, with the consent of Congress, to impose and levy a duty on the tonnage of ships and vessels, for the purposes therein mentioned," so far as the same extends to authorizing the city council of Charleston to impose and levy a duty not exceeding six cents, per ton, on all ships and vessels of the United States, which shall arrive and be entered in the port of Charleston from any foreign port or place whatever.

SEC. 2. *And be it further enacted*, That the collector of Charleston is hereby authorized to collect the duty imposed by this act, and to pay the same to such persons as shall be authorized to receive the same by the city council of Charleston.

SEC. 3. *And be it further enacted*, That this act shall be in force for three years, and from thence to the end of the next session of Congress thereafter, and no longer.

APPROVED, March 28, 1806.

RESPONDENT'S BRIEF

121

11

No. 08-310

Supreme Court, U.S.
FILED
FEB 2 3 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Alaska

BRIEF FOR RESPONDENT

WILLIAM M. WALKER
DEBRA J. FITZGERALD
CRAIG W. RICHARDS
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondent

BOTH 4 CAUSES

QUESTIONS PRESENTED

1. Whether an *ad valorem* property tax that falls on numerous types of property, including vessels, violates the Tonnage Clause.

2. Whether an *ad valorem* property tax that apportions the property's value in proportion to its physical presence and commercial activities in each tax situs violates the Commerce Clause or the Due Process Clause.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT 1

SUMMARY OF ARGUMENT 9

ARGUMENT 15

I. VALDEZ'S PROPERTY TAX DID NOT VIOLATE THE TONNAGE CLAUSE 15

A. The Tonnage Clause Does Not Apply To Property Taxes On Vessels 16

B. Petitioner's Attempt To Engraft A "Nondiscrimination" Rule Onto The Tonnage Clause Could Not Impugn The City's Tax And Fails As A Matter Of Law 23

1. Valdez's Property Tax Did Not Single Out Vessels For Taxation 23

2. The Tonnage Clause Does Not Prohibit States From Levying *Ad Valorem* Taxes Only On Vessels 25

II. THE CITY'S APPORTIONMENT FORMULA SATISFIED BOTH THE DUE PROCESS CLAUSE AND COMMERCE CLAUSE 31

A. The City Taxed Only That Portion Of A Vessel's Value Attributable To The Vessel's Productive Commercial Activities Within The City 32

B. The City's Apportionment Formula Did Not Create A Risk Of Duplicative Taxation 44

C. Petitioner's Argument That The Valdez Tax Should Have Accounted For Repairs Or Strikes Is Not Properly Before The Court And Is Meritless In Any Event 50

CONCLUSION 52

TABLE OF AUTHORITIES

Page(s)

CASES

Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment, 347 U.S. 590 (1954) 37, 43

Cannon v. New Orleans, 87 U.S. (20 Wall.) 577 (1874) 20

Cent. R.R. Co. v. Pennsylvania, 370 U.S. 607 (1962) ..... *passim*

Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 10, 20, 26, 29

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 25

Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983) 36

DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 (2006) 23

Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos., 435 U.S. 734 (1978) 30, 31

Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980) 22

Fargo v. Hart, 193 U.S. 490 (1904) 39

Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U.S. 217 (1908) 40

Goldberg v. Sweet, 488 U.S. 252 (1989) 33, 36

Great N. Ry. Co. v. Weeks,
297 U.S. 135 (1936) 36

Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, 283 U.S. 123 (1931) 12, 33

Hays v. Pac. Mail S.S. Co.,
58 U.S. (17 How.) 596 (1854) 48

Heath v. Alabama,
474 U.S. 82 (1985) 51

Hicks v. Miranda,
422 U.S. 332 (1975) 35

Huse v. Glover,
119 U.S. 543 (1886) 16, 17, 31

Inman S.S. Co. v. Tinker,
94 U.S. 238 (1877) 17, 18, 20, 25

Japan Line, Ltd. v. L.A. County,
441 U.S. 434 (1979) 15, 48, 51

Johnson Oil Ref. Co. v. Oklahoma,
290 U.S. 158 (1933) 38

Luckenbach S.S. Co. v. Franchise Tax Bd.,
219 Cal. App. 2d 710 (Dist. Ct. App. 1963) ... 13, 35

Luckenbach S.S. Co. v. Franchise Tax Bd.,
377 U.S. 215 (1964) 13, 35

Mandel v. Bradley,
432 U.S. 173 (1977) (per curiam) 35

MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498 (2008) 33, 36, 44

Michael M. v. Superior Court,
450 U.S. 464 (1981) 29

Michelin Tire Corp. v. Wages,
423 U.S. 276 (1976) 30

Miller Brothers Co. v. Maryland,
347 U.S. 340 (1954) 33

Moorman Mfg. v. Bair,
437 U.S. 267 (1978) ..... *passim*

Morgan v. Parham,
83 U.S. (16 Wall.) 471 (1872) 21

Morgan's S.S. Co. v. La. Bd. of Health,
118 U.S. 455 (1886) 17

Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362 (1940) 33, 45

New York ex rel. N.Y. Cent. & Hudson River R.R. Co. v. Miller,
202 U.S. 584 (1906) 13, 41, 49

Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n, 390 U.S. 317 (1968) ..... *passim*

N.W. Airlines, Inc. v. Minnesota,
322 U.S. 292 (1944) 43

Okla. Tax Comm'n v. Jefferson Lines, Inc.,
514 U.S. 175 (1995) 15, 36, 40, 41, 42

Ott v. Miss. Valley Barge Line Co.,
336 U.S. 169 (1949) 36, 45, 47

Packet Co. v. Keokuk,
95 U.S. 80 (1877) 10, 16, 21

The Passenger Cases,
48 U.S. (7 How.) 283 (1849) 18

Pullman's Palace Car Co. v. Pennsylvania,
141 U.S. 18 (1891) 36

Quill Corp. v. North Dakota,
504 U.S. 298 (1992) 25, 33

R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986) 35

Rowley v. Chicago & N.W. Ry. Co.,
293 U.S. 102 (1934) 36

S.S. Co. v. Portwardens,
73 U.S. (6 Wall.) 31 (1867) 10, 16, 17

State Tonnage Tax Cases,
79 U.S. (12 Wall.) 204 (1871) ..... *passim*

Transp. Co. v. Parkersburg,
107 U.S. 691 (1882) 28, 29

Transp. Co. v. Wheeling,
99 U.S. 273 (1878) ..... *passim*

Union Refrigerator Transit Co. v. Kentucky, 199 U.S. 194 (1905) 15, 49

Union Tank Line Co. v. Wright,
249 U.S. 275 (1919) 38, 39

Westinghouse Elec. Corp. v. Tully,
466 U.S. 388 (1984) 45

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 ..... *passim*

U.S. Const. art. I, § 8 ..... *passim*

U.S. Const. art. I, § 10, cl. 2 ..... 29, 30, 31

U.S. Const. art. I, § 10, cl. 3 ..... *passim*

STATUTES

Alaska Stat. § 29.45.070 25

Alaska Stat. § 43.56.210 ..... 3, 24

Ind. Code § 6-1.1-1-11 25

Neb. Rev. Stat. § 77-1245 37

Valdez Municipal Code § 3.12.010 3

Valdez Municipal Code § 3.12.020 ..... 3, 4, 21

Valdez Municipal Code § 3.12.022 ..... 3, 11, 25

Valdez Municipal Code § 3.12.060 25

Valdez Municipal Code § 3.28.010 ..... 3, 11, 24

Wis. Stat. § 76.07 37

OTHER AUTHORITIES

W.H. Burroughs, *A Treatise on the Law of Taxation* (1877) 19, 27

Thomas M. Cooley, *A Treatise on the Constitutional Limitations* (7th ed. 1908) 19

Samuel Freeman Miller, *Lectures on the Constitution of the United States* (1891) 19

State of Alaska, Alaska Taxable 2000: Municipal Taxation-Rates and Policies 4, 5, 24

Joseph Story, *Commentaries on the Constitution of the United States* (5th ed. 1891) 19

BRIEF FOR RESPONDENT

Respondent City of Valdez respectfully submits that the judgment of the Supreme Court of Alaska should be affirmed.

STATEMENT

During the tax years at issue, petitioner's oil tankers each spent an average of 45 days per year in port in the City of Valdez, Alaska, where they loaded millions of barrels of valuable crude oil for transport to West Coast refineries. Pet. App. 9a. While in the City, petitioner's vessels and their crews enjoyed the same extensive municipal services that the City provided to its residents, as well as a number of services that the City furnished exclusively to ocean-going vessels, which continued to derive benefit from many of those services when at sea. To pay for these services, the City levied an *ad valorem* property tax on numerous types of both personal and real property, including petitioner's vessels.

Petitioner does not challenge the City's authority to tax its vessels on an *ad valorem* basis; rather, it takes issue with the manner in which the City imposed its tax. Petitioner argues that the City's property tax violated the Tonnage Clause—a seldom-invoked constitutional provision that prohibits States from laying "any duty of tonnage" (U.S. Const. art. I, § 10, cl. 3)—because it purportedly fell "*only* on certain large vessels." Pet. Br. 3 (emphasis in original). And petitioner argues that the tax violated the Due Process Clause of the Fourteenth Amendment and the dormant aspect of the Commerce Clause because the tax supposedly enabled the City to tax time that a vessel spends on the high seas and thereby

created a risk of duplicative taxation. Both of petitioner's constitutional challenges fail.

Petitioner is asking this Court to hold, for the first time since the Founding, that an *ad valorem* property tax can violate the Tonnage Clause. But, as this Court has held on numerous occasions and the Alaska Supreme Court recognized below, the Tonnage Clause simply does not apply to property taxes. Moreover, even if the Court broke with this settled line of authority to hold that the Tonnage Clause bars "discriminatory" property taxes, the City's tax, which applied to many types of property other than vessels, could not accurately be termed "discriminatory."

Petitioner's challenge to the City's apportionment formula under the Due Process Clause and Commerce Clause is equally unavailing. The City's "port-day" formula fairly apportioned each vessel's value according to the location of its productive commercial activities; time spent on the high seas is irrelevant to that method of apportioning value. But even if petitioner were correct that the value of its vessels can only be apportioned according to their physical presence, it is wrong to claim that a vessel's domicile State possesses the exclusive authority to tax the share of value proportionate to the time the vessel spends on the high seas. Petitioner's attempt to afford "super" taxing status to a vessel's domicile State would resurrect a modified version of the "home port" doctrine, which, until discarded by courts in favor of the rule of apportionment, reserved to a vessel's domicile the exclusive right to tax the vessel. Petitioner offers no plausible basis for reviving this now-defunct and discredited doctrine.

The Alaska Supreme Court's judgment should be affirmed.

1. The City of Valdez is a municipality of approximately 4,500 residents situated on the north end of Prince William Sound, Alaska. Port Valdez is within the City's limits, as is the southern terminus of the Trans Alaska Pipeline System ("TAPS"). The pipeline carries oil extracted from Alaska's North Slope to Port Valdez, where it is loaded onto oil tankers for transport to refineries in other States.

During the tax years in question, the City—like countless other municipalities—assessed an *ad valorem* property tax on a number of different types of property within its jurisdiction. The City applied the same mill rate—twenty mills, or two percent—to all property that it taxed, including mobile homes, trailers, recreational vehicles, and certain property used in oil and gas exploration, production, and pipeline transportation. *See* Valdez Municipal Code §§ 3.12.010-.022, 3.28.010; Pet. App. 45a-47a. As part of its *ad valorem* tax on oil and gas property, the City taxed a wide variety of property classified as "tangible personal property," including motor vehicles, machinery, appliances, supplies, maintenance equipment, and other non-exempted personal property used in oil and gas exploration, production, and pipeline transportation. Alaska Stat. § 43.56.210; Valdez Municipal Code § 3.28.010.

For more than two decades, the City excluded oil tankers and other large vessels from its property tax. In 1999, however, the City extended its property tax to cover vessels that are more than ninety-five feet in

length.[1] The 1999 ordinance instructed the City Assessor to "allocate to the city the portion of the total market value of [each covered vessel] that fairly reflects its use in the city." Valdez Municipal Code § 3.12.020(B)(1). In a subsequent resolution, the City approved the City Assessor's default taxation formula, which apportioned value according to a ratio designed to ascertain the proportion of a vessel's productive commercial activities that took place in Valdez—the number of days spent in Port Valdez divided by the number of days in all ports. Pet. App. 55a. The resolution further provided that a taxpayer could petition the City for a different apportionment formula if it believed that the apportionment method did "not reasonably represent the portion of the total value of the vessel that should be" attributed to the City. *Id.* at 56a.

The 1999 ordinance applied to both intrastate and interstate vessels, but permitted the City to tax only those vessels that had a tax situs within the City. Valdez Municipal Code § 3.12.020(C). Consistent with these criteria, the City applied its *ad valorem* tax to a variety of vessels, including oil tankers, barges, tugboats, and a local tour vessel, some of which operated only in Alaska's waters. Alaska S. Ct. Excerpts of Record ("E.R.") 273-74, 317, 565-72. In 2000, the year the City's tax ordinance took effect, non-oil-shipping vessels constituted approximately a third of the vessels subject to the City's tax. *Id.* That year, the City collected $17,588,214 in property taxes from all sources. State

---

[1] The tax exempted vessels used "primarily in some aspect of commercial fishing" and vessels that dock at the Valdez Container Terminal. (The latter were subject to a separate municipal dockage charge.) Valdez Municipal Code § 3.12.020(A)(1).

of Alaska, Alaska Taxable 2000: Municipal Taxation—Rates and Policies 16 (2001), *at* http://www.commerce.alaska.gov/dcra/osa/pub/00Taxable.pdf. The assessed value of taxable real and personal property used in activities associated with oil and gas exploration, production, and pipeline transportation constituted approximately 68% of the City's tax base (*id.* at 35), and the City's local levy on real property not associated with oil and gas activities accounted for 22%. *Id.* In contrast, the City's personal property tax on vessels accounted for less than 11% of the City's tax base. *Id.*

The City used the property tax revenue to pay for the municipal services that it provided, including the community hospital, sewage systems, utilities, roads, the municipal airport, law enforcement services, and emergency response systems. Pet. App. 54a. In addition, the City maintained a school district, community college, animal control department, library, local parks, and recreation facilities, and supported various community service organizations. Def.'s Alaska S. Ct. Br. App. A.

2. Valdez residents were not the only beneficiaries of these municipal services. The hundreds of vessels that called at Port Valdez each year, as well as their crew members, also benefited from the City's services.

Because both Port Valdez and the TAPS terminus are located within the City's borders, the City had particularly extensive contacts with oil tankers and their crews. Indeed, through subsidiary shipping companies, the five oil companies that operate TAPS—Exxon Mobil, British Petroleum, ConocoPhillips, Koch Industries, and Chevron—operated dedicated fleets of oil tankers that loaded hundreds of

millions of barrels of crude oil each year at Port Valdez and then transported the oil to refineries in Hawaii, on the West Coast, and (rarely) in foreign countries.

The oil shippers' extensive physical presence and commercial activities in the City had significant economic and environmental repercussions. The regular presence of oil tankers placed, on average, an additional 550 people within the City each year, a more than ten-percent increase in the City's total population. E.R. 273, 438. While in the City, the tankers' transient crews utilized many of the same benefits and services that the City provided to its permanent residents. *Id.* at 441, 477. And, each of the shippers had at least one employee who permanently resided in the City. E.R. 215.

The City also provided services that were specifically necessitated by the oil tankers' continuous presence within its port. For example, the City provided alternative docking facilities that tankers used when being repaired or when the TAPS terminal was unavailable. J.A. 74. The City also helped to maintain an orderly flow of marine traffic in and out of the harbor by providing public notice to non-tankers to stay clear of the security zone around the Alyeska Marine Terminal. *Id.*

The oil shippers' activities in and around the City also presented significant environmental challenges, the gravest of which was the possibility of oil spills. In an effort to reduce the potential impact of such spills, the City permitted oil shippers to utilize its Civic Center for emergencies and coordinated with the shippers to conduct periodic "oil spill drills" at the center. These drills diverted the center's law enforcement and management personnel away from

their regular job duties. E.R. 322-23. The City also made its police, firefighters, emergency response teams, and medical resources available to the oil companies. J.A. 76.

Many aspects of the City's environmental response program were developed in the aftermath of the 1989 *Exxon Valdez* oil spill, which occurred well outside of Valdez but nevertheless had profound environmental and economic consequences for the City. After the oil tanker ran aground on a reef twenty miles outside the City in Prince William Sound, spilling eleven million gallons of crude oil, thousands of workers inhabited the City during the ensuing three-year cleanup of the surrounding shoreline. These workers—some of whom lived on a vessel docked at a City-owned facility—consumed numerous municipal resources, and their presence stressed landfill and sewage ponds beyond then-existing capacities. City officials held staff meetings twice daily to coordinate with the cleanup workers, and a number of City employees were reassigned from their regular jobs to aid in the cleanup efforts. E.R. 323-25.

The City also has developed extensive security measures to safeguard TAPS, its port, and the vessels that dock there. After the September 11, 2001, terrorist attacks, the City collaborated with the Coast Guard to install an infrared surveillance system that enables the City to monitor activities in the port. J.A. 75. The City was also responsible for alerting the public to the expanded "security zones" established by the Coast Guard in Prince William Sound, which protect the oil tankers from potential terrorist attacks. *Id.* And, in December 2003, pursuant to a national "Code Orange" alert, Port Valdez was closed to all vessel traffic, and the City's law enforcement personnel were responsible for guarding

access to the port on rotating twelve-hour shifts. J.A. 75-76.

3. Petitioner is the oil shipping company that ConocoPhillips owns for purposes of transporting TAPS oil to ports in Hawaii, Washington, and California. Petitioner's principal place of business during the tax years in question was California; it has since relocated its principal place of business to Texas. Pet. for Cert. 4. During those tax years, petitioner's vessels each spent an average of 45 days per year docked in the City, where they loaded all of the oil that they transported to refinery facilities. E.R. 475-76.

Petitioner sued the City in Alaska state court, challenging the constitutionality of its property tax for the tax years 2000 to 2004, which amounted to between $400,000 and $1.7 million annually. Petitioner argued, among other things, that the property tax was an unconstitutional duty of tonnage, and that the tax violated the Commerce Clause and Due Process Clause because the City's apportionment formula purportedly "apportion[ed] values to Valdez that are not associated with a vessel's presence in Valdez." E.R. 7.

The trial court initially held that the City's tax violated the Tonnage Clause on the factually incorrect basis that "large vessels, and only large vessels, are the only personal property taxed by the City." Pet. App. 43a. After the City moved for reconsideration, the court vacated its ruling and, after further briefing, held that the City's apportionment method violated the Commerce and Due Process Clauses because it created a "risk of multiple taxation." *Id.* at 34a. At the time, the trial court declined to pass on the Tonnage Clause issue, but because the City's ap-

portionment formula is severable from its tax ordinance, the City later renewed its motion for summary judgment on the Tonnage Clause issue, and the trial court rejected petitioner's Tonnage Clause challenge. *Id.* at 30a.

On appeal, the Alaska Supreme Court upheld the City's property tax in its entirety. Emphasizing that petitioner had conceded that its vessels possessed a taxable situs in the City, the court held that the City's tax satisfied the Due Process Clause and Commerce Clause because it was "fairly apportioned" among all tax situses and permitted the City to tax only its fair share of the value of petitioner's vessels. Pet. App. 8a-9a, 10a-15a. With respect to the Tonnage Clause, the Alaska Supreme Court explained that a fairly apportioned property tax is not a duty of tonnage. *Id.* at 18a. Because petitioner's vessels were "taxed based on their value," consistent with a traditional property tax, the court held that the City's tax did not constitute an impermissible tonnage duty. *Id.*

SUMMARY OF ARGUMENT

The City's *ad valorem* levy upon petitioner's vessels did not violate the Tonnage Clause. Nor did the formula used by the City to apportion the vessels' taxable values violate the Due Process Clause or the dormant aspect of the Commerce Clause.

I. The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art I, § 10, cl. 3. Valdez's property tax did not violate that proscription for the simplest of reasons: Its *ad valorem* tax on property was not a "Duty of Tonnage."

A. Since the Founding, this Court has invalidated on Tonnage Clause grounds only two types of

impositions: actual tonnage duties—*i.e.*, taxes levied in proportion to the cubic capacity of the vessel (*see, e.g.*, *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 212 (1871))—and, far less frequently, flat fees charged to vessels arriving in port whether or not the vessel avails itself of any service or benefit the port provides. *See S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31, 34-35 (1867). Because this latter category of fees was imposed for nothing more than the "privilege of entering, trading in, or lying in a port" (*Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265-66 (1935)), it was considered to be a tax on vessels as "instruments of commerce and navigation" (*Transp. Co. v. Wheeling*, 99 U.S. 273, 277 (1878)) and thus contrary to the "spirit and purpose" of the Tonnage Clause. *Packet Co. v. Keokuk*, 95 U.S. 80, 87 (1877).

In 220 years, however, this Court has never held an *ad valorem* property tax to be an unconstitutional duty of tonnage. Quite the contrary, the Court has considered it "too well settled to admit of question" that "taxes levied by a State, upon ships or vessels . . . as property, based on a valuation of the same as property," are not "[t]onnage duties." *Wheeling*, 99 U.S. at 279, 283. The fundamental distinction between *ad valorem* taxes on vessels and tonnage duties, the Court recognized (*see id.*), is that the former are based on the property's continuous relationship with the taxing jurisdiction and, accordingly, cannot be viewed as charges simply for the "privilege of entering, trading in, or lying in port." *Clyde Mallory*, 296 U.S. at 266.

B. Petitioner seems to acknowledge this much, conceding—as it must, in light of *Wheeling*—that "a State need not exclude vessels from a generally applicable *ad valorem* property tax." Pet. Br. 17. It contends, though, that the Tonnage Clause does not

tolerate "property taxes that fall *only* on vessels," and argues that Valdez's tax "effectively single[d] out ocean-going tankers." *Id.* at 10, 17 (emphasis added).

Petitioner's characterization of Valdez's tax is false. Valdez assessed its *ad valorem* tax at a single rate on a diverse variety of property—not just oil tankers, and not even just large vessels, but also mobile homes, trailers, recreational vehicles, and various types of personal property defined under state law as oil and gas property, including motor vehicles, machinery, appliances, supplies, and maintenance equipment. Valdez Municipal Code §§ 3.12.022, 3.28.010. Indeed, vessels accounted for only *eleven percent* of the City's tax base in 2000. The notion peddled by petitioner that Valdez "single[d] out ocean-going tankers" for taxation is a canard. The *truth* is that Valdez taxed other types of personal property on the same basis as petitioner's oil tankers. That makes the City's property tax indistinguishable from the *ad valorem* tax on steamboats and other personal property that this Court upheld against a Tonnage Clause challenge in *Wheeling*.

But even if Valdez had repealed all of its other property taxes and taxed on only oil tankers resident in the City, that still would not convert the City's *ad valorem* property tax into a duty of tonnage. On the broadest reading of the Tonnage Clause, it prohibits only those taxes or fees "upon the ship as an instrument of commerce." *Wheeling*, 99 U.S. at 284. As *Wheeling* explains, "the State may tax the owners of such personal property for their interest in the same." *Id.* at 283-84. That a property tax falls only on vessels does not make it any less a property tax; its predicate is the property's habitual relationship with the taxing jurisdiction, not merely the entry

into the jurisdiction's ports. If petitioner's complaint is that the City's tax discriminated against large vessels, its remedy (if any) lies in the Equal Protection Clause or, more likely, the political process—but not, in any event, the Tonnage Clause.

II. Petitioner's due process and dormant Commerce Clause challenges to the City's apportionment formula also fail. Petitioner itself acknowledges that a locality "may impose a property tax upon its fair share of an interstate transportation enterprise." Pet. Br. 31 (quoting *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 324 (1968)). The City did nothing more.

A. Petitioner's due process argument that the City taxes "extraterritorial values" proceeds from the premise that the *only* permissible metric for apportioning the value of movable property is "the taxable object's actual proportionate presence within the taxing jurisdiction." Pet. Br. 33. "[T]he Constitution," petitioner contends, "does not tolerate the use of an apportionment formula" that is not based on "the actual location of a taxpayer's property." *Id.* at 37. But neither the Due Process Clause nor this Court's jurisprudence imposes such a methodological straightjacket on localities. Cities and states across the Nation utilize myriad formulas for apportioning the value of property, and this Court has made clear that so long as localities' tax levies—however calculated—are not "out of all proportion to the business transacted . . . in th[e] State" (*Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931)), they satisfy the requirements of due process.

Judged from this perspective, the City's apportionment formula clearly passes constitutional muster. Valdez measured the portion of the vessel's total

commercial activity conducted in Valdez by dividing the number of productive days the vessel spends in port in Valdez by the number of days it spends in all ports, and apportioned the vessel's value to Valdez in accordance with that ratio. This Court has previously approved a similar "port-day" formula for allocating value (*Luckenbach S.S. Co. v. Franchise Tax Bd.*, 219 Cal. App. 2d 710 (Dist. Ct. App. 1963), *appeal dismissed*, 377 U.S. 215 (1964)), and it should reaffirm that position here. By looking to the vessel's productive commercial activity, Valdez's measure reasonably apportioned the value of movables according to the economic value that they generate in various locations. That plainly is a reasonable method of assessing in-state value, which is all that due process requires.

Even if petitioner were correct that the only constitutional method of apportioning movable property is in accordance with its physical presence in the tax situs—and it is not—the City's apportionment formula still would comport with due process. Petitioner's argument that taxation of property temporarily absent from any tax situs amounts to taxation of "extraterritorial values" rests on the assumption that the absent property has some apportionable value independent of the value originated in the property's various tax situses. But this Court necessarily rejected that notion in each of several cases holding that a domicile tax situs may tax the full value of property that spends much of the year absent from it but acquires no other tax situs. *See, e.g.*, *New York ex rel. N.Y. Cent. & Hudson River R.R. Co. v. Miller*, 202 U.S. 584, 597 (1906). Otherwise, the domicile itself would be taxing the "extraterritorial values."

Petitioner's answer—that a domicile has "unique justification" for taxing temporarily absent "extraterritorial values" that other tax situses do not (Pet. Br. 33)—has no foundation in *due process*. Indeed, if it were correct, the constitutionality of an apportionment formula could turn on where a taxpayer chose to domicile itself. That is a very peculiar *constitutional* rule, and this Court should reject it.

B. Nor did the City's apportionment formula pose any "prospect of duplicative taxation" (Pet. Br. 27) that might implicate the dormant aspect of the Commerce Clause.

Petitioner's imagined risk of duplicative taxation hinges entirely on its assertion that *only* a taxpayer's domicile—and no other tax situs—may levy upon the property's time spent outside of any tax situs. Nothing in the Commerce Clause (dormant or actual) or the cases interpreting it remotely suggests that domiciles enjoy the "super" taxing authority that petitioner suggests.

Petitioner relies heavily on this Court's decision in *Central Railroad Co. v. Pennsylvania*, 370 U.S. 607 (1962), but that reliance is badly misplaced. *Central Railroad* did not hold (or even imply) that a domicile jurisdiction may tax "no-tax-situs" time to the exclusion of all other tax situses. To the contrary, *Central Railroad* rejected the argument that a domicile State had an apportionment claim superior to other established tax situses. *Id.* at 613. Its reasoning can be reconciled only with the sensible proposition that when apportioning value, the same rules apply to domiciles and other tax situses alike.

In fact, petitioner is simply attempting to resuscitate a modified version of the discredited "home port" doctrine, which long ago "yielded to the rule of

fair apportionment." *Japan Line, Ltd. v. L.A. County*, 441 U.S. 434, 442 (1979). Petitioner's strategic rationale for the effort is exposed by its recent change of domicile from California to Texas. On petitioner's super-domicile theory, going forward, one-half or more of the value of each of its ships—the fraction corresponding to the portion of the tax year that each ship is located in no identifiable tax situs—would be taxable only by its domicile. But because petitioner's ships never visit Texas, Texas likely is powerless to tax even the ships' "no-tax-situs" time. *See Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194, 201 (1905). If the goal of apportionment is (as this Court has noted) to "slic[e] a taxable pie among several [localities] in which the taxpayer's activities contributed to taxable value," it is an odd interpretation of the dormant Commerce Clause that compels localities to allocate the greatest "slic[e]" to the locality that provided the smallest (and perhaps no) "contribution to taxable value." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 186 (1995).

ARGUMENT

I. VALDEZ'S PROPERTY TAX DID NOT VIOLATE THE TONNAGE CLAUSE.

Petitioner invites this Court to hold, for the first time since the Founding, that an *ad valorem* property tax violates the Tonnage Clause. The Alaska Supreme Court correctly held that the Tonnage Clause does not apply to *ad valorem* taxes like the City's tax at issue here. Pet. App. 20a. But even if this Court were willing to announce an unprecedented expansion of the Clause to bar any "discriminatory" *ad valorem* tax, the City's tax—which ap-

plied to numerous types of property, not just vessels—was not remotely discriminatory.

A. The Tonnage Clause Does Not Apply To Property Taxes On Vessels.

1. The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. art. I, § 10, cl. 3. As petitioner concedes (at 15), the "literal scope" of the Clause is quite narrow: Crafted by the Framers to be a loophole-closing complement to the Import-Export Clause's ban on state levies on imported or exported goods (*S.S. Co. v. Portwardens*, 73 U.S. (6 Wall.) 31, 34-35 (1867)), the Tonnage Clause prohibits only certain duties measured in proportion to a vessel's "internal cubic capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 212 (1871); *see also Portwardens*, 73 U.S. (6 Wall.) at 34-35 (the "words [of the Tonnage Clause] describe a duty proportioned to the tonnage of the vessel; a certain rate on each ton"). By its terms, the Tonnage Clause does not apply to *ad valorem* property taxes.[2]

This Court has occasionally invoked the "spirit and purpose" of the Tonnage Clause (*Packet Co. v. Keokuk*, 95 U.S. 80, 87 (1877)) to suggest that certain fees not measured in tons might also violate the Clause when levied upon vessels as "instruments of

---

[2] Indeed, not even every duty measured by a vessel's tonnage is an impermissible duty of tonnage. *See, e.g.*, *Huse v. Glover*, 119 U.S. 543, 549 (1886) (upholding a tonnage-based toll for using state-constructed locks because "[t]his is simply a mode of fixing the rate according to the size of the vessel and the amount of property it carries" through the locks).

commerce and navigation." *Transp. Co. v. Wheeling*, 99 U.S. 273, 277 (1878). But this Court's extension of the Tonnage Clause beyond its literal terms has not occasioned a sweeping repudiation of taxes and fees levied on vessels. To the contrary, the *only* cases in which the Court has struck down a state tax as a violation of the Tonnage Clause—the last of which was decided in 1877—involved either a literal duty of tonnage (*see, e.g., Inman S.S. Co. v. Tinker*, 94 U.S. 238, 241 (1877) (tonnage duty of "one and one half of one cent per ton")), or a flat per-vessel fee that was completely untethered to the provision of any service, safety, or security for the vessel and thus amounted to a tax on the use of public waterways. *See Port-wardens*, 73 U.S. (6 Wall.) at 34-35; *see also Huse v. Glover*, 119 U.S. 543, 549-50 (1886) (defining a "duty of tonnage" as "a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country"); *Morgan's S.S. Co. v. La. Bd. of Health*, 118 U.S. 455, 463 (1886).

2. At the same time, this Court has consistently recognized—as "too well settled to admit of question"—that "taxes levied by a State, upon ships or vessels . . . as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution." *Wheeling*, 99 U.S. at 279; *see also State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213 ("Taxes levied by a State upon ships and vessels . . . *as property, based on a valuation of the same* as property, are not within the prohibition of the Constitution . . . .") (emphasis in original). Indeed, "[a]nnual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question." *Id.* at 214.

The inapplicability of the Tonnage Clause to property taxes has been one of the most consistent themes in this Court's Tonnage Clause jurisprudence. *Wheeling* alone invoked the distinction between tonnage duties and property taxes no fewer than ten times. *See* 99 U.S. at 279-85. It emphasized, for example, that "[t]onnage duties on ships by the States are expressly prohibited, but taxes levied by a State upon ships or vessels owned by the citizens of the State as property, based on a valuation of the same as property, are not within the prohibition." *Id.* at 283; *see also id.* at 285 ("[T]he enrolment of a ship or vessel does not exempt the owner of the same from taxation for his interest in the ship or vessel as property, upon a valuation of the same, as in the case of other personal property.").[3] And other cases have invalidated tonnage duties only after emphasizing that they "applied wholly irrespective of the *ad valorem* principle" (*Inman*, 94 U.S. at 243), or were "levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 217; *see also, e.g.*, *The Passenger Cases*, 48 U.S. (7 How.) 283, 402 (1849) (a State "may tax a ship or other ves-

---

[3] *See also, e.g.*, *Wheeling*, 99 U.S. at 279 ("[T]here are many cases in which the courts . . . have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property."); *id.* at 282 ("[O]wners of ships and vessels are liable to taxation for their interest in the same upon a valuation as for other personal property."); *id.* at 284 ("Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce, but they all admit, expressly or impliedly, that the State may tax the owners of such personal property for their interest in the same.").

sel used in commerce the same as other property owned by its citizens").

The leading early commentators on the Constitution similarly recognized that the Tonnage Clause does not apply to *ad valorem* taxes. Justice Story's *Commentaries* categorically state that "[t]axes levied upon vessels owned by the citizens of the State as property, based on their value as property, as *e.g.* on their tonnage, are not within the constitutional provision." Joseph Story, *Commentaries on the Constitution of the United States* § 1016, at 738 n.(a) (5th ed. 1891). Similarly, in his *Lectures on the Constitution*, Justice Miller explained that a vessel "is liable to be taxed like any other property that [the owner] may possess." Samuel Freeman Miller, *Lectures on the Constitution of the United States* 254 (1891). Thomas Cooley's *Constitutional Limitations* and William Burroughs's seminal tax treatise adopt the same view. *See* Thomas M. Cooley, *A Treatise on the Constitutional Limitations* 689-91 (7th ed. 1908) ("The meaning of [the Tonnage Clause] seems to be that vessels must not be taxed as vehicles of commerce, according to capacity; but it is admitted they may be taxed like other property.") (footnote omitted); W.H. Burroughs, *A Treatise on the Law of Taxation* 91 (1877) (J.A. 83-84) ("The prohibition only comes into play where they are not taxed in the same manner as other property of citizens of the State, but where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel.").

3. As these cases and commentaries make clear, the crucial distinction between a (constitutional) property tax and an (unconstitutional) tonnage duty is that the former is assessed based on the value of the vessel. Thus, a tax is an impermissible tonnage

duty where, "[i]f either of the . . . vessels . . . was new and making her first voyage, and another of the same tonnage was making her last trip before being broken up, and the former were of many times the value of the latter, the act would apply the same procrustean rule to both." *Inman*, 94 U.S. at 243; *see also State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 224 (invalidating a tonnage duty because it "depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs").

This distinction accords even with the "spirit and purpose" sometimes ascribed to the Tonnage Clause. Taxes based on vessel value do not constitute charges on vessels as "instruments of commerce" (*Wheeling*, 99 U.S. at 277), or for the "privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 266 (1935). Indeed, unlike a tonnage duty—which applies indiscriminately to vessels without regard to their connection to the taxing jurisdiction (*see Cannon v. New Orleans*, 87 U.S. (20 Wall.) 577, 580 (1874) (striking down a tonnage duty that was "due from all vessels arriving and stopping in a port"))—a property tax presupposes not only that the vessel has entered the port, but also that the vessel has developed a sufficient relationship with the taxing jurisdiction to justify the assessment of a tax on the vessel's value. *Cf. Inman*, 94 U.S. at 243 (striking down a tonnage duty that applied if "the vessel enter[ed] the port and immediately t[ook] her departure").

Thus, while tonnage duties "ten[d] immediately to interfere with and to obstruct the commerce between the States," a property tax upon a vessel that

has acquired a tax situs in the jurisdiction where it is docked is no different from a "tax . . . laid upon lumber or cotton lying on the dock." *Morgan v. Parham*, 83 U.S. (16 Wall.) 471, 475 (1872). Because such a tax can be imposed only on property that has acquired a tax situs in the jurisdiction, the assessment of property taxes on vessels does not threaten to erect the "local hindrances to trade and carriage by vessels" that the Tonnage Clause is designed to avoid. *Keokuk*, 95 U.S. at 85.

4. As the Alaska Supreme Court correctly recognized, the City's property tax was—in both label and function—a tax "based on th[e] value" of the property. Pet. App. 18a. By its terms, the tax did not apply indiscriminately to all vessels—or even to all oil tankers—that entered Port Valdez. Instead, the tax applied only to those vessels that acquired a tax situs within the City. Valdez Municipal Code § 3.12.020; Pet. App. 46a. Petitioner concedes that its vessels acquired a tax situs in Valdez by virtue of their substantial and habitual presence in the City. Pl.'s Alaska S. Ct. Br. 21-22; Pet. App. 8a-9a. That is the end of the matter under the Tonnage Clause because the City's tax was levied on petitioner's vessels "as property, based on a valuation of the same as property" (*State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213 (emphasis omitted)), not for the privilege of entering, trading in, or lying in Port Valdez.

Petitioner nevertheless insists that the tax was a tonnage duty because the City used its property tax as a general revenue measure. Pet. Br. 23-24. But petitioner does not explain why the use of property tax funds for general revenue purposes would transform a valid tax on vessels "as property" into an unconstitutional duty of tonnage. Indeed, the very point of a property tax is to raise revenue so that the

taxing government can provide services to its residents and visitors, including hospitals, schools, and the other "advantages of a civilized society." *Exxon Corp. v. Wis. Dep't of Revenue*, 447 U.S. 207, 228 (1980) (internal quotation marks omitted). Petitioner's contention that the City used its tax revenues for an impermissible general revenue purpose is baffling. It is also flatly inconsistent with this Court's decision in *Wheeling*, which *upheld* a municipal property tax levied on steamboats as a general revenue measure for "the use of the city." 99 U.S. at 277.[4]

Petitioner's "impermissible purpose" test also would give rise to insuperable administrative difficulties. Petitioner apparently envisions that, when confronted with a Tonnage Clause challenge, courts will scour the books and records of the taxing jurisdiction to determine whether the fungible funds raised were dedicated to vessel-specific services or were instead used as part of the jurisdiction's general revenue. But courts are manifestly ill-equipped to perform such technical and time-consuming accountings of municipal coffers, and this Court has held repeatedly that taxpayers may not predicate their constitutional challenges to taxes solely on the manner in which a State chooses to expend the re-

---

[4] Petitioner thinks it "notable that an early Congress that contained many of the Framers of the Constitution believed that a tax for the purpose of funding a hospital *was* subject to the Tonnage Clause." Pet. Br. 24 (emphasis in original). But even a cursory review of the acts reveals that South Carolina sought (and was granted authority by Congress) to impose a *literal* duty of tonnage—not to exceed "six cents, per ton"—on *all* vessels entering Charleston harbor. Pet. Br. Addendum 3a.

sulting revenues. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006).

In any event, no such burdensome inquiry is required to resolve this case. Petitioner's concession that its vessels acquired a tax situs within the City conclusively establishes that the City's property tax was not a duty of tonnage. The Court's Tonnage Clause inquiry can—and should—end there.

B. Petitioner's Attempt To Engraft A "Nondiscrimination" Rule Onto The Tonnage Clause Could Not Impugn The City's Tax And Fails As A Matter Of Law.

Despite two centuries of settled case law that States and municipalities may impose property taxes on vessels, petitioner argues that the City's tax violated the Tonnage Clause because "large vessels, and only large vessels, [were] the only personal property taxed by the City." Pet. Br. 22 (citing Pet. App. 43a). That is wrong as a factual matter. Valdez imposed its *ad valorem* tax on many other types of property within its jurisdiction—some of which are expressly denominated as "personal property" by Alaska statute—using the same mill rate that the City applied to vessels. But even if Valdez had singled out vessels for *ad valorem* taxation, the tax would not have violated the Tonnage Clause. There is nothing in the text of the Clause or this Court's precedent that supports the novel view that a municipality must tax some indeterminate amount of non-vessel property before it can impose a property tax on vessels.

1. Valdez's Property Tax Did Not Single Out Vessels For Taxation.

Contrary to petitioner's oft-repeated contention, Valdez did not single out vessels for property taxa-

tion. The City's property tax applied to numerous other kinds of property within its jurisdiction, including personal property. Petitioner never discusses these other types of property, but this omission cannot change the incontrovertible historical facts.

Pursuant to Section 3.28.010 of the Valdez Municipal Code, the City imposed its *ad valorem* tax on all property that is taxable under Alaska Statutes Chapter 43.56. *See* Valdez Municipal Code § 3.28.010 (levying "a tax on all taxable property taxable under Alaska Statutes Chapter 43.56 at the rate of taxation that applies to other property taxed by the city"). Chapter 43.56, in turn, encompassed a host of oil and gas properties that are expressly denominated as "real and *tangible personal property*," including motor vehicles, machinery, appliances, supplies, maintenance equipment, and other non-exempted personal property used in oil and gas exploration, production, and pipeline transportation. Alaska Stat. § 43.56.210 (emphasis added). Thus, the City taxed a wide variety of "personal property" other than vessels. In fact, vessels accounted in 2000 for less than eleven percent of the City's tax base. State of Alaska, Alaska Taxable 2000: Municipal Taxation—Rates and Policies 35 (2001), *at* http://www.commerce.alaska.gov/dcra/osa/pub/00Taxable.pdf. Because petitioner's Tonnage Clause challenge hinges on its belief that vessels were the *only* type of "personal property" taxed by the City, that argument fails on its own terms.

The remainder of Valdez's property tax scheme confirms that the City did not single out vessels for special tax treatment. In addition to taxing vessels and various oil and gas properties, the City also taxed certain mobile homes, trailers, and recreational vehicles on an *ad valorem* basis. Valdez Mu-

nicipal Code § 3.12.022. It imposed precisely the same mill rate—twenty mills, or two percent—on all of these different types of property. *Id.* § 3.12.060.

To be sure, Valdez classified mobile homes and trailers as "real property," but this classification carries no constitutional significance. As petitioner acknowledges (at 26 n.13), the Court must "loo[k] past 'the formal language of the tax statute [to] its practical effect.'" *Quill Corp. v. North Dakota*, 504 U.S. 298, 310 (1992) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)) (first alteration added); *see also, e.g., Inman*, 94 U.S. at 244 (under the Tonnage Clause, "the name [of the tax] is immaterial; it is the substance we are to consider"). Other States classify precisely the same property as "personal property" (*see, e.g.*, Ind. Code § 6-1.1-1-11 (defining "personal property" to include "mobile houses")), and indeed Valdez itself could have done so with a flick of the legislative pen. *See* Alaska Stat. § 29.45.070 (providing that "[m]obile homes, trailers, house trailers, trailer coaches, and similar property" are generally "classified as real property for tax purposes unless expressly classified as personal property by ordinance"). Thus, the practical effect of the City's property tax ordinances was to tax various kinds of similar property at the same mill rate. The tax would therefore survive constitutional scrutiny even if petitioner were correct that the Tonnage Clause includes a nondiscrimination principle.

2. The Tonnage Clause Does Not Prohibit States From Levying *Ad Valorem* Taxes Only On Vessels.

Valdez chose to tax a number of types of personal property, and other similar property, in addition to vessels. But even if it had not done so, the City's

property tax on vessels still would not have violated the Tonnage Clause. Petitioner resists this conclusion by contending that the Tonnage Clause contains a so-called "anti-discrimination" principle that prohibits States and municipalities from imposing *ad valorem* taxes only on vessels. Pet. Br. 12-22. Petitioner is wrong for at least four reasons.

a. The "anti-discrimination" principle that petitioner proposes has no basis in either the text or purpose of the Tonnage Clause. The language of the Clause does not create any nondiscrimination rule; as explained above, it prohibits only certain duties on vessels that are measured in terms of "tonnage," *i.e.*, the internal cubic capacity of a vessel. Nor does the purpose of the Clause supply such a rule: Even under the broadest conception of its purpose, the Tonnage Clause would reach only taxes or fees that operate as a charge on "the privilege of entering, trading in, or lying in a port." *Clyde Mallory*, 296 U.S. at 265-66. Because an *ad valorem* property tax is not—and cannot be—a charge on port access, it is not a tonnage duty regardless of which property is subject to the tax. *See supra* pp. 19-21.

b. The quotations that petitioner culls from this Court's decision in *Transportation Co. v. Wheeling*, 99 U.S. at 273, do not support the existence of a subtextual nondiscrimination principle lurking within the Tonnage Clause. Petitioner seizes (at 17) on *Wheeling*'s acknowledgment that States may tax vessels "in the same manner as other personal property" (99 U.S. at 284), but *Wheeling* does not hold, as petitioner implies, that a municipality must tax other kinds of property in order for a property tax on vessels to satisfy the Tonnage Clause. *Wheeling*'s reference to the "same manner" (and similar language allowing taxation of vessels "like other property," Pet.

Br. 18 n.7) simply refers to taxation *based on property value*—that is, *ad valorem* taxation. *Wheeling* establishes that taxes levied on vessels "as property, based on a valuation of the same as property, . . . are not within the prohibition of the Constitution." 99 U.S. at 279; *see also supra* pp. 17-19 (discussing other cases that reach the same conclusion).

That *Wheeling* did not create (*sub silentio*) a new nondiscrimination rule is confirmed by the Burroughs treatise from which the Court drew the "same manner" language. Burroughs, like the Court, described a sharp distinction between tonnage duties and property taxes, explaining that the Tonnage Clause "only comes into play where [vessels] are not taxed in the same manner as other property of citizens of the State, *but* where the tax is imposed upon the vessel, the instrument of commerce, without reference to the value of the vessel." Burroughs, *supra*, at 91 (J.A. 83-84) (emphasis added). By contrasting taxes "in the same manner as other property" with tonnage duties imposed "without reference to the value of the vessel," Burroughs made clear that the "same manner" referred to *ad valorem* taxation.

In paraphrasing the treatise, *Wheeling* inadvertently substituted an "or" for the italicized "but." *See Wheeling*, 99 U.S. at 284. This does not, however, obscure the passage's meaning: A State or municipality may tax the value of vessels just as it may tax the value of *any* property, but the taxation of *other* property is not a prerequisite for imposing a property tax on vessels. Even if the City's property tax had fallen only on vessels—and, as demonstrated above, that is not remotely the case—the tax would nonetheless remain an assessment based on the value of property that has acquired a tax situs within Valdez, not a charge for the privilege of accessing the port.

c. Petitioner's attempt to engraft a nondiscrimination principle onto the Tonnage Clause also is irreconcilable with this Court's decision in *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882). In *Parkersburg*, this Court rejected a Tonnage Clause challenge to an "exorbitant" wharfage fee—a fee assumed both to bear no relation to the actual cost or value of the wharfage and to impose a "burden on commerce." *Id.* at 696. While "[e]xorbitant wharfage may have a similar effect as a burden on commerce as a duty of tonnage," the Court emphasized that such a fee is still "exorbitant wharfage, and not a duty of tonnage; and the remedy for one is different from the remedy for the other." *Id.* Similarly, here, if it is a "discriminatory" tax of which petitioner complains, it is a discriminatory tax and not a duty of tonnage, and the remedy (if any) lies in some other provision of the Constitution—perhaps the Equal Protection Clause—or, more likely, in the political process.

The appellant in *Parkersburg*, like petitioner here, protested that the exorbitant wharfage fee was a tonnage duty in disguise, but the Court dismissed this attempt to recharacterize the ordinance: "The allegations of the bill that it is not real wharfage, but a duty of tonnage, in the name and under the pretext of wharfage, cannot be received against the terms of the ordinance itself." 107 U.S. at 695. "[I]ntent," the Court emphasized, "is not material" to whether a fee constitutes an impermissible duty of tonnage. *Id.* Any other rule would "open the door to an inquiry, in every case of wharfage alleged to be unreasonable, which would lead to great inconvenience and confusion" because neither courts nor juries "would have any practicable criterion by which to judge of the secret intent with which the charge was made, whether as wharfage or as a duty of tonnage." *Id.*

These same "inconvenience[s]" would follow from petitioner's proposed nondiscrimination rule. In each case, courts would be required to peer into the legislative mind in a futile effort to determine whether the lawmakers truly intended to enact a (permissible) *ad valorem* tax on vessels as property or instead harbored a "secret intent" to enact an (impermissible) duty on the vessels as "instruments of commerce" under the guise of a property tax. Such an intent-based inquiry is both "immaterial" to a tax's constitutionality under the Tonnage Clause (*Parkersburg*, 107 U.S. at 695), and inherently elusive. *See, e.g.*, *Michael M. v. Superior Court*, 450 U.S. 464, 468-70 (1981) (discerning the motivation of a legislative body is always a "hazardous matter"). It also would require courts to draw imprecise boundaries between discriminatory and nondiscriminatory taxes based on how many and what kinds of other property a jurisdiction chose to tax. Particularly in the absence of any textual or historical support, this Court should not adopt such a radical (and unadministrable) approach to the Tonnage Clause. Instead, as in *Parkersburg*, the Court's analysis should begin and end with the "the terms of the ordinance itself"—an *ad valorem* property tax that did not impose any "charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory*, 296 U.S. at 265-66.

d. Finally, unable to locate any meaningful support for its nondiscrimination rule in this Court's Tonnage Clause decisions, petitioner turns to a different constitutional provision: the Import-Export Clause. *See* U.S. Const. art. I, § 10, cl. 2. Petitioner claims that the Import-Export Clause prohibits *ad valorem* property taxes that apply discriminatorily to imports or exports, and that the Court should import

that nondiscrimination rule to the Tonnage Clause. Pet. Br. 19-21.

Even if the Import-Export Clause does contain the broad nondiscrimination principle urged by petitioner, it is difficult to see how the City's property tax could conceivably have violated that principle. Both on its face and in practice, the City's tax applied equally to in-state and out-of-state vessels. Indeed, the City's tax applied to petitioner's vessels, which operate in several jurisdictions, in exactly the same manner as it applied to those operating exclusively in Alaska's waters. E.R. 273-74, 317, 565-72.

In any event, petitioner's attempt to append a nondiscrimination component to the Import-Export Clause nets it nothing. Petitioner relies primarily on a footnote from *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), involving what even petitioner concedes was a "hypothetical discriminatory tax on imports." Pet. Br. 25. The Court explained, in *dicta*, that a law taxing the retail sale of imported but not domestic goods would be "invalidated as a discriminatory imposition that was, in practical effect, an impost." *Michelin Tire*, 423 U.S. at 288 n.7.[5]

And even assuming that this Court intended to announce, in a footnote of *dicta*, a sweeping nondiscrimination principle applicable to the Import-Export Clause, *Michelin Tire* would have little bearing on

---

[5] Petitioner tries to transform this Court's analysis into a holding by counting the number of times that *Michelin Tire* and the later decision in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978), used the word "nondiscrimination." Pet. Br. 20-21. But neither case presented the question whether an *ad valorem* property tax that fell only on imports or exports would violate the Import-Export Clause.

this Court's *Tonnage Clause* jurisprudence. The Import-Export Clause prohibits taxation of imports as imports and exports as exports (*see Dep't of Revenue v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 757-59 (1978)), but the Tonnage Clause contains no similar limitation with respect to vessels. *See Wheeling*, 99 U.S. at 276 (unsuccessful argument that, "as shipping is put by the Constitution precisely upon the same footing as imports, any tax upon property, whilst it continues in the form of shipping, is as illegal as a tax upon property whilst it remains in the condition of imports"). Instead, the Tonnage Clause prohibits only particular types of fees—a duty based on the cubic capacity of a vessel, and perhaps also a charge for "entering or leaving a port, or navigating the public waters of the country" (*Huse*, 119 U.S. at 549-50)—that, as explained above, are fundamentally different from a property tax on vessels.

In short, petitioner can point to nothing in the text or purpose of the Tonnage Clause, or in this Court's precedent, that would require a municipality to tax non-vessels before it can levy a property tax on vessels. This Court should reject petitioner's effort to create such a rule *ex nihilo*.

II. THE CITY'S APPORTIONMENT FORMULA SATISFIED BOTH THE DUE PROCESS CLAUSE AND COMMERCE CLAUSE.

Petitioner contends that the City's apportionment formula—which apportioned the value attributable to each tax situs by dividing the number of productive days that a vessel spends in Port Valdez by the total number of days that it spends in all ports—violated the Due Process and Commerce Clauses because it "artificially inflate[d] the fraction of a ship's total value that is taxed by the City." Pet.

Br. 26. According to petitioner, the exclusion of days spent on the high seas from the denominator of the apportionment formula taxed value attributable to petitioner's domicile (California—which levied no tax on petitioner's vessels) and thereby created an unconstitutional risk of duplicative taxation. *Id.*

Petitioner's challenge to the City's apportionment formula fails on both counts. The City did not tax extraterritorially because it apportioned a vessel's value based on a factor—port days—that corresponds to the vessel's productive commercial activity in each tax situs. The risk of duplicative taxation posited by petitioner is similarly illusory because it rests on the erroneous propositions that property taxes must be apportioned by daily physical presence and that the State in which a vessel is domiciled possesses exclusive authority to tax the "time" that a vessel spends on the high seas. The City's tax satisfied both the Due Process Clause and the Commerce Clause.

A. The City Taxed Only That Portion Of A Vessel's Value Attributable To The Vessel's Productive Commercial Activities Within The City.

1. The Due Process Clause of the Fourteenth Amendment prohibits the States from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This Clause does not immunize property used in interstate commerce from taxation, but instead imposes two specific limitations: There must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax, as well as a rational relationship between the tax and the values connected with the taxing State."

MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498, 1505 (2008) (quoting *Quill Corp.*, 504 U.S. at 306 (quoting *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45 (1954), and *Moorman Mfg. v. Bair*, 437 U.S. 267, 273 (1978))) (internal quotation marks omitted).

Petitioner concedes that there was a sufficient connection between its vessels and Valdez so that the City had jurisdiction to tax the vessels as property—*i.e.*, that Valdez was a tax situs. Pet. App. 8a-9a. Instead, it argues only that the City's apportionment formula resulted in the taxation of value that was not reasonably related to Valdez.

It is well-settled that "a State may impose a property tax upon its fair share of an interstate transportation enterprise." *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*, 390 U.S. 317, 323 (1968). In determining its "fair share" of such an enterprise, a State or municipality has "wide latitude" to "selec[t]" an apportionment formula that fairly divides the property's value among each tax situs. *Moorman*, 437 U.S. at 274. This grant of discretion to local taxing jurisdictions reflects both the Court's recognition that "the problem [of apportionment] is incapable of precise and arithmetical solution" (*Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 365 (1940)), and its desire to avoid the "essentially legislative" step of adopting a "single constitutionally mandated method" for apportioning the value of interstate property. *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (internal quotation marks omitted).

An apportionment method is invalid only if it is "out of all appropriate proportion to the business transacted . . . in th[e] State" (*Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135

(1931)), or leads to a "grossly distorted result." *Norfolk & W. Ry.*, 390 U.S. at 326. The taxpayer challenging an apportionment formula bears a "heavy burden" (*id.*) and must present "clear and cogent evidence" that the tax is grossly disproportionate to in-state value. *Moorman*, 437 U.S. at 274 (internal quotation marks omitted).

2. The Alaska Supreme Court correctly held that the City's port-day apportionment formula permitted the City to tax only that portion of a vessel's value that was fairly attributable to its productive commercial activity within the City.

The City's port-day formula allocated the value of a vessel among all tax situses in relation to the productive time that the vessel spends in each tax situs on the eminently sensible supposition that a vessel's productive commercial activity corresponds closely to the productive time in port. In this manner, the City ensured that the proportion of a vessel's value apportioned to the City reasonably approximated the proportion of the vessel's commercial activity that was conducted in the City. For example, in 2000, petitioner's vessels spent approximately one-quarter of their total port time in Port Valdez, where they loaded all of the oil that they subsequently transported to other port facilities. Under the port-day apportionment formula, the City imposed a tax on approximately one-quarter of the vessels' value. Apportioning one-quarter of a vessel's value to the municipality in which the vessel spent one-quarter of its dock time—and where it loaded *all* of its commercially valuable cargo—cannot conceivably be viewed as a "grossly distorted result." *Norfolk & W. Ry.*, 390 U.S. at 326.

Indeed, the Court has already approved a similar port-day apportionment formula. In *Luckenbach Steamship Co. v. Franchise Tax Board*, 219 Cal. App. 2d 710 (Dist. Ct. App. 1963), *appeal dismissed*, 377 U.S. 215 (1964), the California District Court of Appeal upheld a port-day formula that apportioned a vessel's income based on the number of days in California ports divided by the number of days in all ports. *Id.* at 720-21. The taxpayer appealed the decision to this Court, challenging the port-day apportionment formula on Commerce Clause and due process grounds. This Court dismissed the taxpayer's appeal "for want of a substantial federal question" (*Luckenbach v. Franchise Tax Bd.*, 377 U.S. 215 (1964)), which is a disposition on the merits (*Hicks v. Miranda*, 422 U.S. 332, 344 (1975)) that is entitled to "precedential weight." *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 150 n.20 (1986); *see also Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (a dismissal "for want of a substantial federal question" "reject[s] the specific challenges presented in the statement of jurisdiction").

Petitioner nevertheless contends that, by excluding days on the high seas from the denominator, the port-day formula allowed the City to tax a vessel for part of the "time" it spent on the high seas and thus resulted in the taxation of the vessel at a rate that exceeded the vessel's "actual presence within the City's territorial jurisdiction." Pet. Br. 26-28. Although petitioner professes to disavow any suggestion that "the Constitution permits only one method of measuring actual presence" (*id.* at 37), petitioner is essentially seeking a new constitutional rule that would foreclose the City from apportioning a vessel's value on any basis other than the vessel's proportionate physical presence in Valdez.

This Court has never required taxing jurisdictions to employ a particular formula to calculate in-state taxable values. *Goldberg*, 488 U.S. at 261. To the contrary, a State or municipality may employ *any* apportionment method it chooses so long as the method does not reach "beyond that portion of value that is fairly attributable to economic activity within the taxing [jurisdiction]." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). Thus, the Court has approved a range of apportionment formulas for both property taxes and income taxes based on factors that include not just the duration of the property's physical presence within the taxing jurisdiction but also the commercial value generated by the property within the jurisdiction.[6]

In *Great Northern Railway Co. v. Weeks*, 297 U.S. 135, 142 (1936), for instance, this Court approved an apportionment formula for railroad property that averaged the proportion of "gross earnings"

---

[6] *See, e.g., Rowley v. Chicago & N.W. Ry. Co.*, 293 U.S. 102, 108-09 (1934) (multi-factor tax formula for taxing railroad property that considered mileage traveled, use of rolling stock, and gross and net operating revenues); *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983) (three-factor income tax formula based on payroll, property, and sales); *Moorman*, 437 U.S. at 273 (single-factor income tax formula based on sales); *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169, 173 (1949) (property tax formula for vessels that considered total number of miles traveled in Louisiana against total number of miles traveled everywhere); *Pullman's Palace Car Co. v. Pennsylvania*, 141 U.S. 18, 19 (1891) (similar mileage-based formula for railroads). The Court has not maintained a strict dichotomy between property taxes and income taxes in deciding questions of apportionment, and has relied on income tax precedents in deciding property tax cases (*see, e.g., Norfolk & W. Ry.*, 390 U.S. at 326) and vice versa. *See, e.g., MeadWestvaco*, 128 S. Ct. at 1506.

attributable to the State with several other metrics. Since a "single-factor formula is presumptively valid" (*Moorman*, 437 U.S. at 273), the City could have adopted an apportionment method based solely on the percentage of revenue generated by the vessels' activities in Valdez. This formula would have resulted in a much larger apportionment percentage than the 26% that petitioner claims is unconstitutionally excessive. Pl.'s Alaska S. Ct. Br. 28 n.73. It would also have been even less tied—indeed, barely related—to the "physical presence" measure that petitioner would enshrine as the sole permissible metric.

Similarly, Valdez could have employed a formula similar to the one discussed by this Court in *Braniff Airways, Inc. v. Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 593 n.4 (1954), and still used by the State of Nebraska, Neb. Rev. Stat. § 77-1245, which apportions the value of aircraft based on the in-state percentages of (1) take-offs and landings, (2) passengers and cargo, and (3) revenue originated. (Wisconsin applies a similar formula. *See* Wis. Stat. § 76.07(4g)(b).) This formula likely would have attributed over 60% of the tankers' value to Valdez, but more importantly it would bear little relationship to actual physical presence in the City.[7]

---

[7] If petitioner's tankers called, on average, on two refineries for every visit to Valdez—which is consistent with the fact that the vessels typically had only one or two American tax situses other than Valdez, *see* J.A. 21-45—then the appropriate apportionment ratio would have been 61%: (1) 1/3 of their arrivals and departures in Valdez, (2) 1/2 of their oil handled in Valdez (and the other half divided among the refineries to which that oil was delivered), and (3) perhaps 100% of their revenue originating in Valdez, where they loaded all of the oil.

If petitioner were correct that the City's tax is unconstitutional because it did not apportion value based on average physical presence during the year, then these other commonly used apportionment formulas also would be invalid.

Petitioner invokes several of this Court's decisions in the railroad tax context to argue that the only permissible apportionment method for movable property is one based on the property's "actual proportionate presence within the taxing jurisdiction." Pet. Br. 34-37 (citing *Norfolk & W. Ry.*, 390 U.S. at 317; *Johnson Oil Ref. Co. v. Oklahoma*, 290 U.S. 158 (1933); *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919)). No such rule emerges from those cases. And even if it did, the rule would make little sense in the context of ocean-going vessels.

In each of these cases, the issue was how to determine the percentage of a railroad company's rolling stock that could be taxed in a particular State. Because the "individual cars" were "constantly running in and out of each State," this Court allowed States to divide the rolling stock based on averages: "When individual items of rolling stock are not continuously the same but are constantly changing . . . , this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits." *Johnson Oil Ref.*, 290 U.S. at 162; *see also Union Tank Line*, 249 U.S. at 282 (noting the Court's approval of "methods of appraisement producing results approximately correct"). Thus, in *Johnson Oil Refining*, the Court resolved this "situs" inquiry (290 U.S. at 161-62) by allowing Oklahoma to "tak[e] the number of cars which on the average were found to be physically present within the State." *Id.* at 163.

In *Norfolk & Western Railway* and *Union Tank Line*, in turn, the Court used this averaging technique as a benchmark to evaluate alternative, mileage-based methods for assessing value. *Norfolk & Western Railway* held that Missouri's mileage-based assessment on the taxpayer's railroad property was "grossly distorted" because it attributed a much greater percentage of the rolling stock to Missouri than was on average employed in the State. 390 U.S. 326-27. But even that decision explained that, given "the practical difficulties involved," the Constitution does not require "any close correspondence between the result of computations using the mileage formula and the value of property actually located in the State." *Id.* at 327. And in *Union Tank Line*, the Court invalidated a mileage-based assessment that did not result in "even approximate accuracy" because it assessed in-state value at many times the "average number of cars within Georgia." 249 U.S. at 283.[8]

These cases did not address the quite different inquiry here: how to apportion the value of a particular piece of property among several States in which that specific property had acquired tax situses. And they certainly did not hold that any such apportionment must correspond precisely to the property's physical presence in the taxing jurisdictions.

---

[8] Petitioner's reliance on *Fargo v. Hart*, 193 U.S. 490 (1904), also is misplaced. In *Fargo*, this Court held only that a tax assessment was invalid because, in apportioning the value of the taxpayer's personal property within the State, Indiana took account of wholly separate personal property that was owned by the taxpayer outside the State and that was unconnected with the in-state business. *Id.* at 500-01.

But even if the cases on which petitioner relies had imposed such a requirement with respect to *railroad* equipment, there is little reason to extend that requirement to ocean-going vessels. Railroad equipment is *always* in some physical location that potentially has authority to tax it. *See Cent. R.R. Co. v. Pennsylvania*, 370 U.S. 607, 611 n.4 (1962). In contrast, vessels by definition spend a portion of their activity on the high seas and thus "outside the taxing jurisdiction of any State." Pet. Br. at i. Because the purpose of apportionment analysis is to "slic[e] a taxable pie among several States in which the taxpayer's activities contributed to taxable value" (*Jefferson Lines*, 514 U.S. at 186), it makes little sense to adopt a constitutional rule that requires States to consider time on the high seas—when a vessel is not in any *State* "contribut[ing] to taxable value"—in allocating value among the various tax situses.

This Court has never imposed such an inflexible approach to apportionment, and it should not do so now. Valdez reasonably apportioned the value of a vessel in accordance with the proportion of the vessel's productive commercial activity that was conducted in Valdez. *See Galveston, Harrisburg & San Antonio Ry. Co. v. Texas*, 210 U.S. 217, 226 (1908) ("[T]he commercial value of property consists in the expectation of income from it."). Due process requires no more.

3. But even if petitioner were correct that the *only* permissible apportionment metric for *any* movable property is average physical presence during the year, it is incorrect that Valdez must specifically have excluded time spent on the high seas to avoid taxing "extraterritorial values." Pet. Br. 28.

Petitioner acknowledges that, on its view, the domicile State could tax "*all* the value for periods when there is no established tax situs," including time that the vessel spends on the high seas. Pet. Br. 33 (emphasis in original). But this time on the high seas is no more spent in the vessel's domicile than it is in Valdez. If petitioner were correct that the time must be separately apportioned, it would be "extraterritorial valu[e]" with respect to *every* State—and thus, on petitioner's view, taxable by none of them.

The Court has repeatedly held, however, that a domicile State can tax at full value property that has acquired no other tax situs—"even if every item of that property should be taken successively into another State for a day, a week, or six months, and then brought back." *New York ex rel. N.Y. Cent. & Hudson River R.R. Co. v. Miller*, 202 U.S. 584, 597 (1906). In *Miller*, for instance, the Court held that the full value of a railroad's rolling stock could be taxed by its domicile State because "the state of origin remains the permanent situs of the property, notwithstanding its occasional excursions to foreign parts." *Id.*

This rule applies with equal force when property is subject to taxation in multiple tax situses. The property's "occasional excursions to foreign parts" do not deprive the tax situses of their collective authority to tax the full value of the property. The only issue is how to "slic[e] a taxable pie among several States in which the taxpayer's activities contributed to taxable value" (*Jefferson Lines*, 514 U.S. at 186), which the City's tax reasonably did by looking at the relative time spent in the competing tax situses.

Thus, although petitioner couches its argument in terms of "extraterritorial" taxation, it is challenging only the allocation of taxing authority between a domicile State and other tax situses. Even petitioner acknowledges that, if the vessels had been domiciled in Valdez, the apportionment formula undoubtedly would have been constitutional. *See* Pet. Br. 33 (arguing that the domicile State may tax "*all* the value for periods when there is no established tax situs" (emphasis in original)). There is no constitutional basis for petitioner's apparent belief that precisely the same apportionment formula could be constitutional if adopted by a domicile but unconstitutional if adopted by any other tax situs.[9]

Petitioner attempts to justify its novel constitutional theory by asserting—without supporting authority or even explanation—that "only the domicile State . . . provides the benefits and protections that justify taxation" of time on the high seas. Pet. Br. 39-40. But non-domiciliary tax situses often provide no fewer benefits and protections than the domicile State.

---

[9] Accordingly, the fact that the value taxed by the City would vary based on the number of days that a vessel spent in other ports (even where the number of days spent in the City is held constant) does not suggest that the City taxed extraterritorial value. It instead reflects the fact that the "taxable pie" must be "slic[ed]" differently depending on a vessel's total port days to reflect each taxing jurisdiction's share of the vessel's productive activity and to ensure that the vessel's full value is taxed. *Jefferson Lines*, 514 U.S. at 186. The City's share of a vessel's productive activity—and hence its share of taxable value—would be significantly greater, for example, if the vessel spent 10 days in the City, 5 days in other ports, and 350 days at sea, than if it spent 10 days in the City, 50 days in other ports, and 305 days at sea.

Take, for example, vessels (like petitioner's) that never visit their domicile port. The benefits and protections that the vessels receive when docked—including docking and maintenance facilities and onshore services for their crews—are provided exclusively by non-domicile States. And these benefits and protections often extend to the vessel's activities on the high seas. For example, the City provides emergency response services to the oil shippers, directs traffic away from security zones in Prince William Sound, and builds and maintains docking facilities for vessel repair that enable vessels to remain in operation. All of these services promote the profitability of petitioner's interstate transportation enterprise and enable petitioner to operate its vessels between ports.

There is no reason to believe that these services are any less substantial than whatever "benefits and protections" the domicile State provides while the vessels are on the high seas. As Justice Jackson explained in the analogous context of a state tax on airplanes, "[t]he planes have received no 'protection' or 'benefit' from [the domicile State] that they have not received from many others. . . . [N]o distinction whatever can be pointed out between those [benefits and protections] extended by [the domicile State] and those extended by any state where there is a terminal or a stopping place." *N.W. Airlines, Inc. v. Minnesota*, 322 U.S. 292, 304-05 (1944) (Jackson, J., concurring); *see also Braniff Airways*, 347 U.S. at 602.

Unsurprisingly, petitioner cannot point to any decision of this Court concluding that a domicile State is entitled to special weight in the apportionment analysis because it provides greater benefits and protections than other tax situses. Instead, this Court has held only that, "[i]f such property has had

insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a 'tax situs,' it is surely appropriate to *presume* that the domicile is the only State affording the 'opportunities, benefits, or protection' which due process demands as a prerequisite for taxation." *Cent. R.R.*, 370 U.S. at 612 (emphasis added). But whatever the merits of this presumption when the domicile State is the *only* tax situs, there is no reason to believe it holds equally when the domicile State is only one of several situses that provide benefits and protections to the property. There is, at the very least, no basis for adopting as *constitutional* law a presumption that the benefits and services provided by the domicile State so greatly outnumber the benefits and services provided by any other situs that the domicile—and only the domicile—can tax activity on the high seas.

B. The City's Apportionment Formula Did Not Create A Risk Of Duplicative Taxation.

1. The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8. Although by its terms this grant of authority to the federal government does not impose any constitutional limitations on State or local taxes, this Court has invoked a so-called dormant or negative component of the Commerce Clause to prohibit taxes that "burden [interstate commerce] by subjecting activities to multiple or unfairly apportioned taxation." *MeadWestvaco*, 128 S. Ct. at 1505.

An apportionment formula raises constitutional concerns under this Court's dormant Commerce Clause precedents only if it permits "multiple taxation" of property that significantly burdens the abil-

ity of the taxpayer to engage in interstate commerce. *Ott v. Miss. Valley Barge Line Co.*, 336 U.S. 169, 174 (1949); *see also Moorman*, 437 U.S. at 276. An apportionment formula must not leave an interstate enterprise in a position substantially worse than if it had conducted its business in only one State. *See Westinghouse Elec. Corp. v. Tully*, 466 U.S. 388, 402-04 (1984). Yet, consistent with the "wide latitude" States and municipalities have in the selection of appropriate apportionment formulas, not all overlapping taxation is unconstitutional. *Moorman*, 437 U.S. at 274. The Court has acknowledged that it is impossible to "mandate such precision in interstate taxation" (*id.* at 278), and has sustained a "number of [apportionment] formulas . . . even though it could not be demonstrated that the results they yielded were precise evaluations of assets located within the taxing State." *Norfolk & W. Ry.*, 390 U.S. at 324 (citing *Browning*, 310 U.S. at 365-66 (citing cases)).

2. Petitioner contends that the City's port-day apportionment formula created a risk of duplicative taxation because it purportedly permitted the City to tax a portion of the time that a vessel spends on the high seas—time that petitioner claims is taxable only by the vessel's domicile State. As discussed above, the City's apportionment formula was based exclusively on the vessel's productive commercial activities within the City, and there is no constitutional requirement that the City separately apportion (and then exclude) "time" on the high seas. Even if petitioner were correct that time on the high seas must be separately apportioned, however, it is wrong to claim that a domicile State possesses the exclusive authority to tax that time.

Petitioner's duplicative taxation argument rests principally on *Central Railroad Co. v. Pennsylvania*,

370 U.S. at 607. That decision does not vest a domicile State—either explicitly or implicitly—with the exclusive authority to tax time on the high seas. Instead, *Central Railroad* held only that the State in which movable property is domiciled can tax that property in full if the property has acquired *no other* tax situs. *Id.* at 612. Thus, railcars that Central Railroad used in its domicile State, Pennsylvania, and also in other States in which they did not acquire a tax situs, were subject to full taxation by Pennsylvania. *Id.* at 614.

Central Railroad did *not* hold, however, that a domicile State retains the exclusive authority to tax property for time that it spends outside of any tax situs when the property in question has acquired a tax situs both in the domicile State and in another State. On the contrary, the Court imposed concrete limitations on the taxing power of a domicile State. For example, the Court invalidated Pennsylvania's effort to tax the full value of railcars that had also acquired a tax situs in New Jersey because New Jersey possessed the right to impose "an apportioned ad valorem tax" on those railcars. *Cent. R.R.*, 370 U.S. at 613 (emphasis omitted).

The Court explained that a "domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it could be taxed by another State, not merely on such property as is subjected to tax elsewhere." *Cent. R.R.*, 370 U.S. at 614 (emphasis omitted). Thus, far from establishing that a domicile State may tax all time that an ocean-going vessel spends outside of any tax situs, *Central Railroad* indicates that fair apportionment among all tax

situses is required *whenever* property is amenable to taxation by more than one jurisdiction.[10]

Indeed, reading *Central Railroad* to afford a "super" taxing authority to domicile States would be fundamentally at odds with the decision's reasoning. The Court's holding that a domicile State may tax the full value of property with no other tax situs was premised on the Court's concern that a contrary rule would permit some property to "escape . . . taxation entirely" (370 U.S. at 617), and on the commonsense proposition that, when no other tax situs exists, the domicile is "the only State affording the 'opportunities, benefits, or protection' which due process demands as a prerequisite for taxation." *Id.* at 612 (quoting *Ott*, 336 U.S. at 174). But, as the Court also recognized, these concerns evaporate when property

---

[10] Petitioner claims to find support for its theory of expansive domiciliary taxing power in *Central Railroad*'s statement that the Due Process Clause does not "'confine the domiciliary State's taxing power to such proportion of the value of the property being taxed as is equal to the fraction of the tax year which the property spends within the State's borders.'" Pet. Br. 42 (quoting *Cent. R.R.*, 370 U.S. at 612). But the context of this statement reveals that the Court was referring to a domicile State's authority to tax "property [that] has had insufficient contact with States other than the owner's domicile to render any one of these jurisdictions a 'tax situs'" (*Cent. R.R.*, 370 U.S. at 612), not to the scope of a domicile State's authority when the property is also subject to taxation in at least one other State. Indeed, the Court drew a sharp distinction between Pennsylvania's authority to tax cars that had acquired a situs in New Jersey and those that had acquired no other situs. *Id.* at 614 ("We conclude . . . that on the record before us Pennsylvania was constitutionally permitted to tax, at full value, the remainder of appellant's fleet of freight cars . . . . These . . . did not run 'on fixed routes and regular schedules' as did the cars used by CNJ.'").

has acquired a second tax situs: At that point, the domicile State is not the only jurisdiction that can tax the property and is not the only jurisdiction that provides protections and benefits to that property. Thus, where property has more than one tax situs, there is no longer any justification for affording the domicile State the exclusive authority to tax time that the property spends outside of any taxing jurisdiction—the non-domiciliary situs is also available to tax that time and is providing protections and benefits to the property that may be equal to, or more extensive than, those provided by the domicile State itself.

Petitioner's effort to imbue domicile States with special taxing authority is nothing more than an attempt to resurrect a modified version of the "home port" doctrine, which generally reserved to a vessel's domicile State the exclusive authority to tax its value. *See Hays v. Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596, 599 (1854). As petitioner acknowledges (at 19 n.8), that common-law doctrine has since "yielded to a rule of fair apportionment" among all tax situses (*Japan Line, Ltd. v. L.A. County*, 441 U.S. 434, 442 (1979)), and should not be revived under the guise of petitioner's theory that domicile States retain the exclusive right to tax time on the high seas.[11]

3. Aside from lacking any precedential support, petitioner's approach to apportionment is also practi-

---

[11] Although the Court has never expressly rejected the "home port" doctrine for ocean-going vessels, whatever rationale may exist for retaining the doctrine with respect to vessels regularly engaged in foreign commerce (*Japan Line*, 441 U.S. at 442) is inapplicable to petitioner's vessels, which are predominantly engaged in commerce among the States.

cally flawed because it would invariably result in the *undertaxation* of ocean-going vessels.

Under *Union Refrigerator Transit Co. v. Kentucky*, 199 U.S. 194 (1905), a domicile State may not tax the personal property of residents that is "permanently located in other states." *Id.* at 201; *see also Miller*, 202 U.S. at 596-97. This is precisely the situation for those oil tankers—including many of the tankers that dock at the City—that spend all of their time either in non-domicile ports or on the high seas. Indeed, petitioner invokes the example of SeaRiver, an oil shipping company domiciled in Texas that regularly docks vessels in the City. Pet. Br. 7. SeaRiver's oil tankers have never actually been to Texas: They were not built there, they are not repaired there, and they never make port there. Texas therefore cannot impose a property tax on those vessels because they are "permanently located" outside the State. *Union Refrigerator Transit*, 199 U.S. at 195-97. According to petitioner, however, neither may a non-domicile State tax the vessels during any of the time they spend on the high seas.

Petitioner's attempt to create special taxing authority for domicile States would therefore create a vast tax loophole: In those instances in which a vessel operates permanently outside of its domicile State, *no* jurisdiction would possess authority to tax the vessel's value during time on the high seas. This rule may well suit petitioner—its vessels *never* visit Texas, which is currently petitioner's domicile State, and thus would remain insulated from taxation during their time on the high seas—but this result is surely not in keeping with *Central Railroad*'s commitment to the preservation of state taxing authority over the *full* value of property. If, as *Central Railroad* indicates, the authority to tax the full value of

property must always be vested in some jurisdiction (or combination of jurisdictions), then the domicile State cannot possess the exclusive authority to tax time on the high seas where a vessel has acquired a tax situs in other States.

C. Petitioner's Argument That The Valdez Tax Should Have Accounted For Repairs Or Strikes Is Not Properly Before The Court And Is Meritless In Any Event.

Petitioner further contends that the port-day apportionment formula was unconstitutional because it did not account for the time that a vessel spends in dry dock or out of service due to a strike. Pet. Br. 47. These arguments are not properly before the Court, and, in any event, fail on the merits.

Petitioner sought and obtained certiorari on whether the Commerce Clause and Due Process Clause permit taxation for time that a vessel spends "*outside* the taxing jurisdiction of any State." Pet. Br. at i (emphasis added). But petitioner now argues that, by excluding dry dock and strike time from the denominator of its apportionment formula, "Valdez is effectively taxing vessels for a portion of the period that they are . . . physically located *in . . . other taxing jurisdictions*." *Id.* at 48 (emphasis added). Indeed, a premise of petitioner's duplicative taxation argument is that "other jurisdictions plainly are entitled to levy property tax on the vessels during these same periods" when vessels are "in some other port for repair (or because of labor unrest)." *Id.* at 41.

Because this dry dock and strike time is not necessarily "outside the taxing jurisdiction of any State," it is not encompassed within the question presented. Nor, for that matter, was it even raised as a separate

issue in the body of the petition for certiorari, which addressed only time spent on the high seas. This Court should not condone petitioner's belated effort to raise new issues.[12]

In any event, there is no merit to petitioner's challenge to the exclusion of dry dock and strike time from the denominator of the City's apportionment formula. This is a tax refund action, but petitioner does not claim that any of its vessels was subject to taxation in another jurisdiction—let alone *taxed* by that jurisdiction—because of time that it spent in dry dock or on strike. To the contrary, petitioner typically dry-docks its vessels in Asia (E.R. 190), where they are likely immune from property taxation since "[o]ceangoing vessels . . . are generally taxed only in their nation of registry." *Japan Line*, 441 U.S. at 447 n.11.

To the extent that any of petitioner's vessels were to become subject to taxation in another jurisdiction because of time spent in dry dock or because of a strike, the appropriate recourse would be to "petition" the City Assessor to "use . . . another apportionment formula that will more fairly represent how the value should be apportioned among Valdez and other taxing jurisdictions." Pet. App. 56a. Until then, any decision by this Court would prematurely address constitutional issues that could well be avoided by the City's administrative process.

But even if this Court were somehow to reach the issue, it should conclude that the City reasonably

---

[12] Indeed, it would be particularly inappropriate for this Court to consider strike time because petitioner failed to raise that issue before the Alaska Supreme Court. *See, e.g., Heath v. Alabama*, 474 U.S. 82, 87 (1985).

adopted an apportionment formula that allocates value based on the commercial activity occurring while a vessel is in port. Because any time the vessel spends out of service in dry dock or on strike is not productive, this time is necessarily excluded from the formula.

Petitioner acknowledged below that the City could have allocated the vessels' value based on "voyage miles"—that is, miles traveled in Valdez divided by total miles traveled. *See* E.R. 97 n.45. This formula would have attributed no value to dry-dock or strike time, but that does not mean the formula results in unconstitutional distortion. Instead, it merely reflects a choice committed by this Court to the discretion of the taxing authority about how best to measure and allocate the property's activity.

CONCLUSION

The judgment of the Supreme Court of Alaska should be affirmed.

Respectfully submitted.

WILLIAM M. WALKER
DEBRA J. FITZGERALD
CRAIG W. RICHARDS
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
AMIR C. TAYRANI
SCOTT P. MARTIN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondent

February 25, 2009

REPLY BRIEF

No. 08-310

In the Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

REPLY BRIEF FOR THE PETITIONER

RICHARD A. LEAVY
KWAKU A. AKOWUAH
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE VALDEZ VESSEL TAX VIOLATES THE TONNAGE CLAUSE. 1

A. Discriminatory Property Taxes Violate The Tonnage Clause. 2

B. The Valdez Vessel Tax Is Discriminatory. 11

II. THE VALDEZ APPORTIONMENT FORMULA TAXES EXTRATERRITORIAL PROPERTY VALUES AND CREATES AN IMPERMISSIBLE RISK OF DUPLICATIVE TAXATION. 14

A. The Valdez Apportionment Formula Systematically Taxes Extraterritorial Values. 16

B. The Stated Basis For The City's Formula Bears No Rational Relationship To The Income-Generating Activities Of Petitioner's Vessels. 20

C. The City's Formula Disregards The Authority Of The Domicile To Tax Personal Property For Periods When It Is Outside A Tax Situs, Thus Subjecting Petitioner's Vessels To An Impermissible Risk Of Duplicative Taxation. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

CASES

Braniff Airways, Inc. v. *Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590 (1954) 20

Central R.R. Co. v. *Pennsylvania*, 370 U.S. 607 (1962) ..... *passim*

Clyde Mallory Lines v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935) 4

Dean Milk Co. v. *City of Madison*, 340 U.S. 349 (1951) 13

Fargo v. *Hart*, 193 U.S. 190 (1904) 22

Great N. Ry. v. *Weeks*, 297 U.S. 135 (1936) 20

Hale v. *Iowa State Bd. of Assessment & Review*, 302 U.S. 95 (1937) 18

Johnson Oil Ref. Co. v. *Oklahoma*, 290 U.S. 158 (1933) 17, 24

Luckenbach S.S. Co. v. *Franchise Tax Bd.*, 33 Cal. Rptr. 544 (Dist. Ct. App. 1963) 19

MeadWestvaco Corp. v. *Ill. Dep't of Revenue*, 128 S. Ct. 1498 (2008) 15

Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976) 10

Moorman Mfg. Co. v. *Bair*, 137 U.S. 267 (1978) 25

Moran v. *New Orleans*, 112 U.S. 69 (1884) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

New York v. *Graves*,
300 U.S. 308 (1937) 18

New York v. *Miller*,
202 U.S. 584 (1906) 18

Norfolk & W. Ry. v. *Mo. State Tax Comm'n*,
390 U.S. 317 (1968) 15, 16, 17, 21

Nw. Airlines, Inc. v. *Minnesota*,
322 U.S. 292 (1944) 15, 24

Ott v. *Miss. Valley Barge Line Co.*,
336 U.S. 169 (1949) 19

Pullmans Palace Car Co. v. *Pennsylvania*,
141 U.S. 18 (1891) 19

Quill Corp. v. *North Dakota*,
504 U.S. 298 (1992) 5

Rowley v. *Chicago & Nw. Ry. Co.*,
293 U.S. 102 (1934) 20

Standard Oil Co. v. *Peck*,
342 U.S. 382 (1952) 21

State Tonnage Tax Cases,
79 U.S. (12 Wall.) 204 (1871) 11

The Passenger Cases,
48 U.S. (7 How.) 283 (1849) 3, 7

Transp. Co. v. *Wheeling*,
99 U.S. 273 (1879) 7, 9, 14

Transp. Co. v. *Parkersburg*,
107 U.S. 691 (1883) 9

Underwood Typewriter Co. v. *Chamberlain*,
254 U.S. 113 (1920) 18

TABLE OF AUTHORITIES
(continued)

Page(s)

Union Refrigerator Transit Co. v. *Kentucky*,
199 U.S. 194 (1905) 17, 25

Union Tank Line v. *Wright*,
249 U.S. 275 (1919) 17

United States v. *Allegheny County*,
322 U.S. 174 (1944) 19

W. Lynn Creamery, Inc. v. *Healy*,
512 U.S. 186 (1994) 14

CONSTITUTIONAL PROVISIONS

Commerce Clause, Art. I, § 8, Cl. 3 10

Import-Export Clause, Art. I, § 10, Cl. 2 ..... 3, 4, 10

Tonnage Clause, Art. I, § 10, Cl. 3 ..... *passim*

STATUTES

Alaska Stat. § 43.56 ..... 11, 12

Alaska Stat. § 43.56.010(b) 12

Alaska Stat. § 43.56.210(5)(A) 13

OTHER AUTHORITIES

Articles of Confederation 3

W.H. Burroughs, *A Treatise on the Law of Taxation* (1877) 8

T.M. Cooley, *A Treatise on the Constitutional Limitations* (7th ed. 1908) 8

J.I.C. Hare, *American Constitutional Law* (1889) 8

S.F. Miller, *Lectures on the Constitution of the United States* (1891) 5, 6, 8

TABLE OF AUTHORITIES
(continued)

Page(s)

J. Story, *Commentaries on the Constitution of the United States* (M.M. Bigelow, ed., 5th ed. 1891) 8

Valdez Municipal Code:

§ 3.12.020(A)(1) 11
§ 3.12.022(B)(2) 13
§ 3.12.030(A)(2) 11

Valdez Ordinance No. 99-17 11

Valdex Resolution No. 00-15 12

REPLY BRIEF FOR THE PETITIONER

The City's brief confirms the aberrational nature of its tax. Valdez is unable to identify any other jurisdiction that imposes vessel-only discriminatory taxes, let alone a judicial decision upholding such a tax. And the City cannot point to any other jurisdiction that refuses to take into account the extent of property's proportionate annual physical presence when determining how much of that property's value is subject to tax. The Constitution precludes the imposition of a tax with such features.

I. THE VALDEZ VESSEL TAX VIOLATES THE TONNAGE CLAUSE.

The City wisely does not assert that its vessel tax may be justified under the Tonnage Clause as a charge for services uniquely rendered to vessels.[1]

---

[1] Although Valdez notes generally (Br. 5-8) that it undertakes certain municipal activities because it is a port, it does not contest the trial court's finding "that the tax is not one for specific services to the vessels." Pet. App. 29a. It hardly could: the Valdez City Council was commendably candid in announcing that the tax was imposed to offset a decline in the City's tax base and would be used "for the funding of the building of a hospital, school, and the needed repairs of city infrastructure and facilities." *Id.* at 54a. As we noted (Br. 24-25), early congressional action confirms the understanding that a levy on vessels imposed to finance municipal improvements (there, a South Carolina tax to finance construction of a seaman's hospital) is a tonnage duty requiring congressional consent. Valdez responds (Br. 22 n.4) that the South Carolina tax was imposed on the basis of tonnage. But this misses the point: the relevance of the congressional action is its recognition that such a tax for municipal improvements is not a user fee that escapes the Tonnage Clause. The form of the tax is immaterial, as Valdez itself acknowledges. Fees denominated by tonnage that *are* for services

Instead, it hangs its case almost exclusively on the contention that property taxes are per se exempt from scrutiny under the Clause, asserting that "this Court has never held an *ad valorem* property tax to be an unconstitutional duty of tonnage." Resp. Br. 10; see *id.* at 15-23. The latter observation is correct as far as it goes: the Court has never had occasion to strike down a vessel tax precisely like the one imposed by Valdez. But the City omits the more interesting part of the story. This Court also has never *upheld* a property tax that discriminates against vessels. Neither, so far as we can determine, has any other court, ever. Indeed, we can find no instance in which any other jurisdiction ever even attempted to *impose* such a tax. There is a reason why Valdez can find no parallel for its tax in more than two centuries of state and municipal practice: its levy is manifestly inconsistent with the Tonnage Clause.

A. Discriminatory Property Taxes Violate The Tonnage Clause.

The City acknowledges that the Tonnage Clause applies to more than levies that fall, in terms, on the tonnage of vessels, recognizing this Court's repeated holdings that "certain fees not measured in tons might also violate the Clause." Resp. Br. 16. Valdez thus accepts that "a flat per-vessel fee that was completely untethered to the provision of any service" (as its tax concededly is untethered to the provision of any service) cannot survive scrutiny under the Clause (*id.* at 17). We must assume that the City likewise agrees that "[i]f [a State] cannot levy a duty or tax * * * graduated on [a vessel's] tonnage * * *, she cannot affect the same purpose by * * * graduat-

rendered to vessels are not proscribed by the Tonnage Clause. *Id.* at 16 n.2.

ing it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries." *The Passenger Cases*, 48 U.S. (7 How.) 283, 458-459 (1849). But the City nevertheless insists that a levy wholly evades review under the Tonnage Clause if it is denominated a property tax, even if that tax is identical in amount and practical effect to a duty falling on a vessel's tonnage. For several reasons, Valdez's wolf in sheep's clothing must be turned away.

1. To begin with, the City's distinction is wholly inconsistent with the Framers' unquestioned intent in adding the Clause to the Constitution.[2] Valdez declares that the Tonnage Clause is "seldom-invoked" (Resp. Br. 1), which is true today. But two centuries ago, the Clause and its companion provision, the Import-Export Clause, were of central importance to the Framers as a principal response to the destructive interstate commercial rivalry that led to the failure of the Articles of Confederation: Madison's graphic image of North Carolina as "a patient bleeding at both arms" from the commercial depredations of neighboring States reflected the seriousness of the Framers' concern. See Pet. Br. 13.

As we explained in our opening brief (at 13-14), the Import-Export Clause addressed this problem by precluding States from taking advantage of favorable geography and superior port facilities by imposing duties on imports or exports and thereby burdening less favorably situated States. As Valdez itself rec-

[2] It also finds no support in the language of the Clause, which does not distinguish in any respect between the "flat per-vessel fees" that Valdez concedes to be unconstitutional and the property taxes that Valdez says evade review.

ognizes, the Tonnage Clause was "[c]rafted by the Framers to be a loophole-closing complement to the Import-Export Clause[]" (Resp. Br. 16; see Pet. Br. 11-15), intended to prevent the evasion of the latter Clause that would follow if States with superior port facilities were permitted to impose taxes targeted at the vessels that *carry* imports and exports. Absent that rule, the Import-Export Clause "could have been nullified by [States] taxing the vessels transporting the merchandise." *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 264-265 (1935).

But it is precisely that nullification that Valdez would permit. It would be a simple matter for States or cities that seek to discriminate against their neighbors to change what all agree to be forbidden tonnage duties on the internal cubic capacity of a particular type of vessel (say, an oil tanker) into property taxes on that same type of vessel, calibrated by the taxing authority to be identical in application, amount collected, and practical effect to the forbidden duty on tonnage. If that evasion were permitted, the undisputed policy of the Tonnage Clause could be frustrated with ease.

That is why this Court has emphasized that the Tonnage Clause proscribes "*all* taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port." *Clyde Mallory Lines*, 296 U.S. at 265-266 (emphasis added). Where a generally applicable tax falls on all property, including vessels, it is possible to say that it does not "operate to impose" such a charge. But when it falls *only* on vessels that make use of the taxing jurisdiction's

harbor, and is identical in amount and practical effect to one on those same vessels measured by cubic capacity, it surely is immaterial that the State labels the levy one on "property" rather than on "tonnage," "number of masts," "size of engines," or "privilege of port entry." The Court must "look[] past the formal language of the tax statute [to] its practical effect." *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 310 (1992) (internal quotation marks omitted).

2. Rather than explain *why* the Framers would have prohibited tonnage duties on cubic capacity while permitting otherwise identical property taxes that fall exclusively on vessels, the City simply asserts that "the crucial distinction between a (constitutional) property tax and an (unconstitutional) tonnage duty is that the former is assessed based on the value of the vessel." Resp. Br. 19. This ahistorical contention would have come as a surprise to the Framers of the Tonnage Clause.

In fact, tonnage was selected as the basis for the prohibition of charges on vessels precisely because the Framers understood that tonnage *was* "the customary mode of measuring the value of a ship." S.F. Miller, *Lectures on the Constitution of the United States* 253 (1891). As Justice Miller explained,

> [a] vessel was said to be of so many tons burden, *which meant that it was worth so much money*, carried so much freight, and, therefore, the method generally adopted of imposing a tax upon its tonnage was the readiest way to fix the amount which that species of property should pay.

Ibid. (emphasis added). See Pet. Br. 15. Given that the Framers understood tonnage to be a *proxy for*

value. Valdez's bright-line distinction *between* tonnage *and* value could not possibly explain the Tonnage Clause. That it became more usual in subsequent years to tax vessels by their assessed value rather than by cubic capacity can have no impact on the constitutional principle.

The City gets no further with its related contention that its distinction accords "with the 'spirit and purpose'" of the Tonnage Clause because "a property tax presupposes not only that the vessel has entered the port, but also that the vessel has developed a sufficient relationship with the taxing jurisdiction to justify the assessment of a tax on the vessel's value," and therefore does not fall on the vessel as an "'instrument[] of commerce.'" Resp. Br. 20. This suggestion that property taxes do not fall on vessels as "instruments of commerce" is a non sequitur: in fact, Valdez asserts later in its argument (Br. 52) that it taxes vessels *to the extent* of their "commercial activity" in port.

In any event, the argument is belied by the City's own tax statute, which "conclusively presume[s]" that a vessel is taxable in Valdez if the ship "takes on cargo within the City of Valdez [that has] a cumulative value in excess of One Million Dollars ($1,000,000) during the tax year." Pet. App. 46a-47a. Because oil tankers may carry a million barrels of oil at a time, a single entry into port *invariably* subjects a tanker to tax, meaning that the Valdez levy is identical in practical effect to a port-use privilege fee. Moreover, the notion that the Framers could have had in mind a distinction based on the "development" of a "relationship" between the vessel and the taxing jurisdiction is an anachronism: at the time of the founding, the home-port doctrine forbade any non-

domiciliary jurisdiction from imposing a property tax on a foreign vessel, regardless of the extent of its contacts. And even disregarding those points, the Framers could hardly have thought that a tonnage duty became acceptable so long as it was applied to a vessel that made repeated entries into port — thus *compounding* the injury the Tonnage Clause was intended to avoid.

3. It therefore is no surprise that Valdez errs in asserting that this Court "consistently" has recognized "[t]he inapplicability of the Tonnage Clause to property taxes." Resp. Br. 17-18; see *id.* at 10, 23. What the Court has recognized, instead, is that the Clause does not bar property taxes provided they treat vessels the same as other personal property — which Valdez's tax plainly does not.

The City is unable to identify a single decision – in this Court or elsewhere – in which a discriminatory *ad valorem* tax on vessels has been upheld. And it is able to construct its argument only by omitting from its quotations of this Court's opinions unfavorable or limiting language. In fact, when the Court has discussed the "settled" rule on the constitutionality of generally applicable property taxes, it has explicitly noted that vessels were not treated less favorably than other personal property. See *Moran* v. *New Orleans*, 112 U.S. 69, 71 (1884) (vessels "valued as other property in the State"); *Transp. Co.* v. *Wheeling*, 99 U.S. 273, 284 (1879) (vessels "taxed in the same manner as the other property"); *The Passenger Cases*, 48 U.S. (7 How.) at 402 (vessels treated "the same as other property"); see also Pet. Br. 17-18.

The same is true of the "leading early commentators on the Constitution" invoked by the City. Three

of the four treatises cited by Valdez refer to the nondiscrimination criterion in the very excerpts quoted by the City at Br. 19.[5] The fourth quotation, which Valdez attributes to Justice Story's *Commentaries*, did not, in fact, originate with Justice Story; it is an editor's note to the fifth edition of the Story treatise, published more than 40 years after the Justice's death. See 1 J. Story, *Commentaries on the Constitution of the United States*, at v (M.M. Bigelow, ed., 5th ed. 1891) (explaining the significance of lettered footnotes). That editor deferred to Judge Hare for further discussion of the Tonnage Clause. *Id.* § 1016, at 738 n.(a). Judge Hare, in turn, unequivocally stated that, under the Tonnage Clause, "[s]hips cannot be singled out by a State for taxation." 1 J.I.C. Hare, *American Constitutional Law* 253 (1889).

1. Finally, the City insists (Br. 26) that "[t]he 'anti-discrimination' principle that petitioner proposes has no basis" in the Tonnage Clause. But as we have explained, without such a principle the Clause would be rendered a dead letter: States and municipalities could evade it at will by denominating their tonnage duties "property taxes."

In fact, as we have noted (Pet. Br. 17-19), this Court's Tonnage Clause decisions have expressly endorsed the nondiscrimination rule we advocate here.

---

[5] Miller, *supra*, at 251 (a vessel "is liable to be taxed *like any other property* that [the owner] may possess.") (emphasis added); T.M. Cooley, *A Treatise on the Constitutional Limitations* 680-681 (7th ed. 1903) (vessels "may be taxed *like other property*") (emphasis added); W.H. Burroughs, *A Treatise on the Law of Taxation* 91 (1877) ("The prohibition only comes into play where they are not taxed *in the same manner as other property* of citizens of the State * * *.") (emphasis added).

declaring that the Clause "comes into play where [vessels] are not taxed in the same manner as the other property of the citizens." *Wheeling*, 99 U.S. at 284. In arguing that the Court really did not mean what it plainly said, the City is reduced to amateur psychoanalysis, asserting (Br. 27) that the Court in *Wheeling* "inadvertently" misstated the rule. This would be an improbable contention in any circumstance. And it is flatly belied here by: (a) the Court's consistent use throughout *Wheeling*, and in other decisions, of a formulation substantially similar to the one labeled an "inadvertent" misstatement by Valdez – a formulation most naturally understood to approve property taxes on vessels only when they are nondiscriminatory (see Pet. Br. 17-18 & n.7); and (b) consistent early practice tying approval of property taxes on vessels to a demonstration that the taxes extended to all personal property. See *id.* at 18-19. Although we made these points in our opening brief, Valdez offers no response.[1]

---

[1] The City obtains no support from *Transportation Co.* v. *Parkersburg*, 107 U.S. 691 (1883), which it discusses at Br. 28-29. There, the Court rejected the argument that an assertedly "exorbitant" wharfage fee charged by a city-owned wharf was really a tonnage duty, explaining that "[t]he one [*i.e.*, a tonnage duty] is a commercial regulation * * * having reference to * * * commerce or revenue; the other is a rent charged by the owner of the property for its temporary use." 107 U.S. at 699. That holding has no bearing whatsoever in this case, where the City is not imposing a user fee or a "rent" for use of its facilities. The City's reliance on *Parkersburg* may reflect its misunderstanding of our argument. We nowhere contend, as the City would have it (Br. 29), that courts should "peer into the legislative mind" to determine whether Valdez lawmakers "truly intended" to tax vessels as instruments of commerce. A discriminatory property tax on vessels *is* a tonnage duty and, as under the Commerce and Import-Export Clauses, determining whether a

The City also makes no serious answer to our observation that a Tonnage Clause anti-discrimination requirement follows from the similar rule under the Import-Export Clause. Valdez does not deny that the Tonnage Clause was intended to complement, and must be given a construction parallel to that of, the Import-Export Clause. And while the City dismisses (Br. 30) this Court's embrace of a nondiscrimination rule in *Michelin Tire Corp.* v. *Wages*, 123 U.S. 276 (1976), as "dicta," it cannot really mean to contend that the Import-Export Clause permits property taxes that discriminate against imports or exports.

The City does argue (Br. 30) that, even if the Import-Export Clause contains a non-discrimination principle, its tax would satisfy that test because the levy applies "equally to in-state and out-of-state vessels." But this argument misses the point. The Framers' concern in the Tonnage Clause was not discrimination against out-of-state vessels (which was impossible at the time in the property tax context because of the home-port doctrine); it was that States would tax vessels as a proxy for taxing the *merchandise* they carried, which often originated in or was destined for other jurisdictions. The Clause's prohibition therefore "extends to *all ships and vessels* * * * whether employed in commercial intercourse between ports in different States or between different ports in the same State." *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 219 (1871). The dispositive question is whether the tax discriminates against ships and vessels. See also Pet. Br. 19 n.8.

tax discriminates is a straightforward question of law that does not turn on legislative intent.

B. The Valdez Vessel Tax Is Discriminatory.

The Valdez tax fails that test. In arguing to the contrary, the City declares that "[t]he notion peddled by petitioner that Valdez 'single[d] out ocean-going tankers' for taxation is a canard." Resp. Br. 11. We respectfully suggest that this harsh characterization of our argument is a tad over-caffeinated. It also is just plain wrong: there can be no doubt that Valdez intended to and did single out vessels when it enacted an ordinance "Amending Chapter 3.12 of the Valdez City Code to Enact a Personal Property Tax on Vessels." Valdez Ordinance No. 99-17.

1. The text of the Valdez Municipal Code makes the discriminatory effect of the City's tax clear. In Section 3.12.020(A)(1), under the heading "Taxation of Personal Property," the *only* items listed are certain "[b]oats and vessels of at least ninety-five feet in length." In case it remained unclear that this provision is exclusive, Section 3.12.030(A)(2) – under the heading "Property Exempt from Taxation" – expressly excludes *all* "personal property not subject to taxation under Section 3.12.020(A)(1)." Pet. App. 48a. The City could scarcely have been more explicit in discriminating against large vessels.

2. The City's principal basis for its contention that its "property tax applied to numerous other kinds of property within its jurisdiction" is its claim that it "imposed its *ad valorem* tax on" oil-and-gas property that is taxable under Alaska Stat. § 43.56. Resp. Br. 24. Notably, however, the City has never before in this litigation asserted that it taxes such oil-and-gas personal property – not in its initial presentation to the trial court; not when seeking reconsideration of the trial court's ruling that "large vessels, and only large vessels, are the only personal

property taxed by the City" (Pet. App. 43a); not before the Alaska Supreme Court. And before this Court, the State of Alaska, while supporting the City as an amicus, carefully does not endorse the City's contention that Valdez imposes its *ad valorem* tax on oil-and-gas property. See Alaska Br. 32-33.

The reason for this otherwise surprising omission is that Valdez in fact does *not* tax oil-and-gas property. Alaska Stat. § 43.56 is a *state-level* tax; the State determines what oil-and-gas property is taxable, values it, issues assessment notices, resolves valuation disputes – and has provided that "[a] municipality may not exempt from taxation property authorized to be taxed under [Chapter 43.56]." Alaska Stat. § 43.56.010(b). The City's only role in this process is as collection agent, collecting tax imposed and assessed by the State of Alaska.[5]

The State thus makes the choices regarding Chapter 43.56 property. If it determines that personal property is not taxable oil-and-gas property, that property becomes available for local taxation. If that property is a large, non-exempt vessel, the City taxes it; if it is not, the City exempts it. This regime in which the relevant taxing authority has exempted *all* personal property under its control from

---

[5] The Valdez resolution establishing the apportionment methodology for the vessel tax itself acknowledges that the oil-and-gas tax is "assessed by the State of Alaska." Valdez Resolution No. 00-15 (Pet. App. 53a). The former City Manager thus noted below that "[a] significant portion of the available tax base located in the City of Valdez is oil and gas property *taxed by the State of Alaska under AS 43.56* and subsequently shared with the City." J.A. 46 (emphasis added).

tax, except for specified vessels – is the very definition of a discriminatory tax.[5]

3. This discrimination is not cured, as Valdez maintains (Br. 24-25) by the City's taxation of mobile homes and trailers. Valdez treats mobile homes and trailers as *real* property, and that is no matter of semantics – the Valdez tax code provides that any mobile home or trailer that is "[n]ot affixed to the site and not connected with utilities[] shall be considered to be personal property and exempt from taxation." Valdez Municipal Code § 3.12.022(B)(2). Thus, contrary to Valdez's claim that the City taxes "various kinds of similar property at the same mill rate" as vessels (Br. 25), Valdez actually exempts all movable personalty other than the disfavored ships.

Smaller boats, large boats docking exclusively at City-owned docks, and large fishing boats are untaxed in Valdez, as are cars and trucks, vans, airplanes, business inventory, jewelry, machinery, and myriad other items of personalty, each of which contributes to the need for police, fire, and other municipal services. The exemption of these forms of

---

[5] Even if the tax under Chapter 43.56 were attributed to the City, that levy applies only to property "used or committed by contract or other agreement for use within this state primarily in the exploration for, production of, or pipeline transportation of gas or unrefined oil." Alaska Stat. § 43.56.210(5)(A). It thus falls on a narrow and limited category of property owned almost exclusively by non-residents of Valdez. In no sense is that tax generally applicable. If attributed to Valdez, Chapter 43.56 would show only that the City has two specialized, discriminatory taxes. Cf. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 n.4 (1951) (rejecting claim that a local trade restriction did not discriminate against interstate commerce because it also discriminated against certain intrastate commerce).

personalty from taxation, even as large vessels docking at private facilities are subjected to tax, raises just the concerns that underlie the anti-discrimination principle identified in decisions like *Wheeling*. "Nondiscriminatory measures, like [an] evenhanded tax, * * * are generally upheld * * * because '[t]he existence of major in-state interests adversely affected . . . is a powerful safeguard against legislative abuse.'" *W. Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 200 (1994) (last ellipses inserted by the Court). That check is absent in Valdez, raising the danger that its discriminatory vessel tax is being used to pass the tax burden on to the jurisdictions that receive goods exported through the City. Indeed, Valdez candidly announced that it enacted its tax for just that purpose, making explicit its intent to resolve its municipal budget crisis on the backs of oil tankers that use its port facilities. Pet. App. 54a; see Pet. Br. 4. Such a tax is invalid under the Tonnage Clause.

II. THE VALDEZ APPORTIONMENT FORMULA TAXES EXTRATERRITORIAL PROPERTY VALUES AND CREATES AN IMPERMISSIBLE RISK OF DUPLICATIVE TAXATION.

As for the apportionment question, the parties agree on the nature of the problem before the Court. The Valdez tax is imposed on petitioner's oil tankers, which are individual items of physical property. The precise value of each tanker is not in dispute, nor is there controversy about the location of each tanker at various times, or about the portion of the year that each tanker spends in – and away from – Valdez. And the City does not deny that its apportionment formula has the necessary and inevitable effect of assigning to Valdez a share of each tanker's value that

very substantially exceeds the portion of the year that the vessel actually spends in the City.

There also should be no doubt about the basic principles that determine whether this apportionment methodology violates the Constitution. A State or municipality may tax only values that have a fair relationship to the "'protection, opportunities and benefits'" it provides the taxpayer. *MeadWestvaco Corp.* v. *Ill. Dep't of Revenue*, 128 S. Ct. 1498, 1505 (2008). Where the taxation of personal property is concerned, the owner's *domicile* draws authority to tax from its relationship with the owner and "the benefits which this relation affords" the owner. *Nw. Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 294 (1944). This relationship has always been understood to allow the domicile to tax personalty for periods when it has *no* tax situs. See, *e.g.*, *Central R.R. Co.* v. *Pennsylvania*, 370 U.S. 607, 615-617 (1962). But for *non-domicile* jurisdictions – like Valdez here – "[a]ny [apportionment] formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing [jurisdiction]." *Norfolk & W. Ry.* v. *Mo. State Tax Comm'n*, 390 U.S. 317, 325 (1968).

The parties do disagree, of course, on whether the "values connected" to Valdez must bear some relationship to the portion of the year actually spent by the taxed property in the City. Although the City's defense of its tax invokes and attempts to distinguish a great many decisions, its argument on this point ultimately reduces to three related propositions: (a) that the formula used by a non-domicile jurisdiction to apportion a tax on a particular item of physical property need not take account of, and may lead to a result that is entirely unrelated to, the property's ac-

tual proportionate physical presence in the taxing jurisdiction (Resp. Br. 36); (b) that Valdez may premise its apportionment formula on the "supposition" that oil tankers engage in "productive commercial activity" *only* when they load and unload oil, and *not* when they transport the oil from one place to another (*id.* at 34); and (c) that taxing authority over personalty for periods when the property has *no* tax situs should go, not to the owner's domicile, but to all jurisdictions that have, through the physical presence of the property, acquired authority to tax the property for *other* portions of the year (*id.* at 42-44). All of these propositions are wrong.

A. The Valdez Apportionment Formula Systematically Taxes Extraterritorial Values.

1. To begin with, for a non-domicile jurisdiction's tax on a specific item of physical property to bear a "rational relationship" to the "property values connected with the taxing State" (*Norfolk & W. Ry.*, 390 U.S. at 325), it *must* take account of the portion of the year that the property spends in (and out of) the State. That follows as matter of logic and common sense. Generally speaking, for non-domicile States, the extent of the "protection, opportunities and benefits" provided by a State to physical property – the factors that justify the imposition of a tax – is directly related to the extent of the physical presence of the property in the jurisdiction. Indeed, Valdez itself recognizes that the taxable value of physical property is associated with the time spent in the taxing jurisdiction, which is why its formula uses days in port as the numerator of its apportionment fraction; the problem is that the City departs from its own logic when it arbitrarily refuses to take account

of the location of the property outside Valdez during a substantial portion of the rest of the year.

This conclusion is confirmed by the Court's decisions, which (so far as non-domiciliaries of the taxing State are concerned) have always emphasized the tie between extent of physical presence and receipt of the "protection" that justifies imposition of a tax. See, *e.g.*, *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194, 204 (1905). Thus, when addressing challenges to apportionment of railroad property by non-domicile jurisdictions, the Court has asked whether the tax was applied in a manner that roughly corresponds to the extent of the actual presence of the property within the jurisdiction's borders. See, *e.g.*, *Norfolk & W. Ry.*, 390 U.S. at 325; *Johnson Oil Ref. Co.* v. *Oklahoma*, 290 U.S. 158, 163 (1933); *Union Tank Line* v. *Wright*, 249 U.S. 275 (1919). Apportionment methodologies that have "no necessary relation" to the extent of physical presence are treated as constitutionally suspect. *Union Tank Line*, 249 U.S. at 283; see *Norfolk & W. Ry.*, 390 U.S. at 320.

To escape the force of this precedent, the City insists that decisions involving railroad equipment have no relevance to the taxation of vessels because the railroad cases involved *fleets* of railcars while its tax concerns "a particular piece of property." Resp. Br. 39-40 (emphasis in original). But the City offers absolutely no reason to attach any relevance to this distinction, or to doubt that tying apportionment to the portion of the year actually spent in the jurisdiction is essential when the question is "how to apportion the value of a particular piece of property among

several States in which that specific property had acquired tax situses." *Id.* at 39.[7]

2. The various other arguments advanced by the City and its *amici* for allowing taxation based in part on time when the property is outside the jurisdiction are similarly insubstantial. *First*, Valdez and its *amici* insist that this Court and some lower courts have sustained a "port-day apportionment formula" similar to the City's. Resp. Br. 35; see Alaska Br. 16. But those formulas were used to apportion *income*, not physical property. Although the City attempts to blur the distinction, this Court has always recognized that there are significant differences between the two. See *Hale* v. *Iowa State Bd. of Assessment & Review*, 302 U.S. 95, 106-107 (1937); *New York* v. *Graves*, 300 U.S. 308, 314 (1937).

For this reason, identical apportionment methodologies do not – indeed, cannot – apply to income and property taxes. Apportionable income is typically "earned by a series of transactions beginning with manufacture in [one state] and ending with sale in other states" (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U.S. 113, 120 (1920)), thereby requiring taxing authorities to look outside their borders in determining "the profits earned within the state." *Id.* at 121. Given the many steps of varying importance that go into the generation of income, determining how to apportion that income among the States

---

[7] The City also dismisses (Br. 40) the railroad decisions by asserting that "railroad equipment is *always* in some physical location that potentially has authority to tax it." But this Court's jurisprudence is replete with cases in which railroad property left the State of its owner's domicile without acquiring a tax situs everywhere else it went. See, *e.g.*, *New York* v. *Miller*, 202 U.S. 584, 597 (1906); *Central Railroad*, 370 U.S. at 615-617.

touched by the process necessarily has a subjective or arbitrary quality. In contrast, the location of physical property can be directly ascertained, and (so far as the property of non-domiciliaries is concerned) "the power to tax is predicated upon jurisdiction of the property." *United States* v. *Allegheny County*, 322 U.S. 174, 184 (1944).[8]

Second, the City gets no further with its contention that the Court "has approved a range of apportionment formulas for both property taxes and income taxes" that look, in part, to "the commercial value generated by the property within the jurisdiction." Resp. Br. 36. We have explained why income tax cases provide the City no support. As for the property tax decisions cited by Valdez, several in fact used formulas based exclusively on proportionate physical presence that did not have the effect of allocating to the taxing State any portion of the time spent elsewhere.[9] And in the remaining decisions relied upon by the City, either the Court expressly did not address the propriety of the apportionment method or the *taxpayer* affirmatively sought (and therefore did not challenge) the use of proportionate

---

[8] *Luckenbach S.S. Co.* v. *Franchise Tax Bd.*, 33 Cal. Rptr. 541 (Dist. Ct. App. 1963), *appeal dism'd*, 377 U.S. 215 (1964), cited by the City at Br. 35, involved a challenge to an *income* tax apportionment formula resting, in part, on a port-time ratio.

[9] *Ott* v. *Miss. Valley Barge Line Co.*, 336 U.S. 169, 173 (1949), and *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U.S. 18, 19 (1891) (cited at Resp. Br. 36 n.6), used mileage formulas that compared in-state with total miles traveled for, respectively, fleets of vessels and railcars. Particularly where fleets are concerned, mileage is a close proxy for physical presence. Unlike the Valdez formula, such a formula does not lead to taxation of property for any of its time outside the taxing State.

in-state revenue as one element of the formula.[10] This authority cannot support a departure from the settled, common-sense practice of predicating property-tax apportionment on the property's proportionate physical presence in the jurisdiction.

B. The Stated Basis For The City's Formula Bears No Rational Relationship To The Income-Generating Activities Of Petitioner's Vessels.

The City's argument also fails for another reason: even if the Constitution permitted States and localities to levy an apportioned tax on the property of a non-domiciliary on some basis other than physical presence, it certainly would not tolerate the ap-

---

[10] See *Braniff Airways, Inc.* v. *Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 591 (1954) (taxpayer "does not challenge the reasonableness of the apportionment") (cited at Resp. Br. 37); *Great N. Ry.* v. *Weeks*, 297 U.S. 135, 144-145 (1936) (taxpayer proposed use of proportionate in-state gross earnings as partial basis for property tax apportionment and did *not* argue to the State "that the apportionment should be made on the basis of physical property") (cited at Resp. Br. 36-37); *Rowley* v. *Chicago & Nw. Ry. Co.*, 293 U.S. 102, 105 (1934) (taxpayer proposed formula making use of proportionate in-state revenues) (cited at Resp. Br. 36 n.6). In addition, those cases differed from this one in a material respect. *Weeks* and *Rowley* concerned tax imposed on in-state rail track that was part of a larger national system. A revenue component was used in the apportionment formula applied in those cases to determine whether the in-state value subject to tax should be adjusted to take account of differences in value at different points in the system. See *Weeks*, 297 U.S. at 143-144; *Rowley*, 293 U.S. at 109-110. Similar factors were at play in *Braniff*, which involved a tax imposed on a fleet of airplanes; use of a revenue component would tend to account for differences in the size and value of planes used in different States. No such consideration is involved in this case.

proach taken by Valdez. The City premises its "port-time" formula on the "supposition that a vessel's productive commercial activity corresponds closely to the productive time in port." Resp. Br. 34. This effectively presumes that a ship engages in productive commercial activity *only* when it is in port loading or unloading cargo, and that it is not engaging in such activity when it is transporting that property from place to place. This is precisely akin to saying that a transcontinental passenger railroad engages in "productive commercial activity" only in New York where the passengers board and in Los Angeles where they disembark, and not in any of the States in between through which the passengers are transported as the train moves from coast to coast.

This theory is nonsensical. The very essence of a cargo ship's business is to *move* property from one place to another. While it doubtless is true, as Valdez notes (Br. 34), that a tanker must load its "commercially valuable cargo," neither that cargo nor the tanker would have any value if the vessel did not then engage in the "productive commercial activity" of leaving the harbor and traversing the high seas to a location where the cargo is to be used. After all, using a "productive commercial activity" rationale, each of the States through which our transcontinental passenger train passed surely would be justified in imposing a property tax. The presumption upon which the City's apportionment formula rests accordingly is wholly divorced from reality.

Having embraced "productive commercial activity" as a theory of apportionment, the City is no more free arbitrarily to treat as "productive" only the particular activity that takes place within its borders (cargo loading) than it would be to declare that an

activity is productive only if it occurs in a State beginning with the letter "A." But that is what Valdez has done, in the process making use of a formula that is not merely imprecise, but affirmatively designed to achieve malapportioned results. Such a result is insupportable: the Constitution does not "tolerate any result, however distorted, just because it is the product of a convenient mathematical formula." *Norfolk & W. Ry.*, 390 U.S. at 327. The Court need go no further than this to conclude that Valdez is "'taxing property outside of the [City] under a pretense.'" *Id.* at 329 (quoting *Fargo* v. *Hart*, 193 U.S. 490, 500 (1904)).

C. The City's Formula Disregards The Authority Of The Domicile To Tax Personal Property For Periods When It Is Outside A Tax Situs, Thus Subjecting Petitioner's Vessels To An Impermissible Risk Of Duplicative Taxation.

Valdez also takes no account of another element of apportionment doctrine: for well more than a century, the Court has held that the State of the owner's domicile has the authority to tax *all* the value of physical property for periods when the property has no tax situs. See Pet. Br. 32-33, 42. Of particular note here, in *Central Railroad* the Court addressed the authority of Pennsylvania to tax a fleet of railcars owned by a taxpayer domiciled in the State. The Court held that Pennsylvania could not constitutionally tax the percentage of the fleet that had acquired tax situs in New Jersey. 370 U.S. at 613-614. But the Court also held that "Pennsylvania was constitutionally entitled to tax, *at full value*, the remainder of appellant's fleet of freight cars" including those that spent time outside any tax situs. *Id.*

at 614 (emphasis added). *Central Railroad* thus effectively answers the question in this case: looking at a fleet of railcars, the Court held that the domicile is entitled to tax the full value of the fleet except for the specific portion that is present and subject to tax in another jurisdiction.

In contending that *Central Railroad* is inapposite here, the City asserts that the decision does not hold "that a domicile State retains the exclusive authority to tax property for the time that it spends outside of any tax situs when the property in question has acquired a tax situs both in the domicile State and in another State." Resp. Br. 46. But that is the clear import of the holding. Treating the fleet of railcars as a whole, the Court held that the property could be taxed *in full* by Pennsylvania as the domicile, except for the "daily average" of cars subject to tax in New Jersey (370 U.S. at 614); the Court did not suggest that New Jersey, by virtue of its status as tax situs for a portion of the fleet, was entitled to tax *any other element* of the fleet for periods when it was outside a tax situs. There is no space between that holding and the conclusion that the domicile may tax the full value of a particular item of personal property for the time that it is outside any tax situs, even though the property has acquired another tax situs for a portion of the year.

On this point, the City is quite wrong in saying (Br. 42) that there is no authority for the proposition that the domicile provides the sorts of benefits and protections that justify imposition of a tax for periods when the property is outside its borders but not in another tax situs. To the contrary, the Court has declared expressly and repeatedly that the "relation between [property owner] and [the State of domicile] –

a relation existing between no other State and [the owner] – and the benefits which this relation affords are the constitutional foundation for the [domicile's] taxing power" over physically absent property. *Nw. Airlines*, 322 U.S. at 294; see *id.* at 297-298; *Central Railroad*, 370 U.S. at 612; *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 384 (1952); *Johnson Oil*, 290 U.S. at 161.[11]

Precisely the same rationale accords the domicile the authority to tax property for *periods* when it lies outside any tax situs, even though it is subject to tax in another jurisdiction for a portion of the year. The domicile's authority to tax physically absent property for those periods rests on its relationship with the owner, and that relationship (as well as the benefits and opportunities that flow from it) is just the same whether or not another jurisdiction is the tax situs of the property for a different portion of the year. To be sure, the domicile must yield to another State for periods when property is physically present and subject to tax in that State, to avoid the danger of duplica-

---

[11] For this reason, Valdez also is wrong in contending (Br. 41-42) that the domicile engages in extraterritorial taxation; the domicile's authority to tax stems from its relationship with the owner. In nevertheless contending that a domicile has no basis for imposing such a tax, the City relies (Br. 13) on Justice Jackson's concurring opinion in *Northwest Airlines*. But Justice Jackson was writing for himself; the majority expressly grounded the domicile's authority in its relationship with the property owner. Compare *Nw. Airlines*, 322 U.S. at 294, 297-298 (majority), with *id.* at 305-306 (Jackson, J.). In any event, it is surprising that the City endorses Justice Jackson's approach; he would have revived the home port doctrine and applied it to airplanes, giving the domicile the *exclusive* right to tax even airplanes that are habitually used elsewhere. See *id.* at 306-307.

tive taxation. But the taxing authority of a non-domicile State rests exclusively on the physical presence of property in that State. See, *e.g.*, *Union Refrigerator*, 199 U.S. at 204. And the presence of property in a non-domicile jurisdiction like Valdez does nothing either to confer authority on that jurisdiction to tax the property when it is somewhere else (*e.g.*, on the high seas) or to diminish the authority of the domicile to impose a tax for the portion of the value reflected by those periods.[12]

The flip side of this discussion is that Valdez's extraterritorial tax subjects petitioner's ships to an impermissible threat of duplicative taxation. If we are correct that the domicile may tax petitioner's tankers at full value for periods when they are on the high seas, the use of the Valdez formula necessarily would lead to the danger of the same values being taxed twice. The City does not deny that the potential for such duplicative taxation would invalidate its scheme. Instead, invoking *Moorman Manufacturing Co.* v. *Bair*, 437 U.S. 267 (1978), the City suggests vaguely (Br. 45) that "not all overlapping taxation is unconstitutional." But we are not presented here with an incidental overlap resulting from "rough approximation" of taxable income produced by different formulas attempting to measure the *same* thing, as in *Moorman*, 437 U.S. at 273; instead, inevitable du-

---

[12] There is no basis for the City's contention (Br. 49) that *Union Refrigerator* bars domiciles from taxing property that is absent for the entire year. *Union Refrigerator* actually held that domiciles lose authority to tax property that is "permanently located *in a state other than that of its owner*" and "is taxable there." 199 U.S. at 206 (emphasis added). That is a product of the fact that the property is present and taxable in a non-domicile State for 100% of the time.

plication would result in this case from the simultaneous application of two incommensurate methods of taxation. As the Court held in *Central Railroad*, 370 U.S. at 612, 614, such an outcome is indefensible.[13]

CONCLUSION

The judgment of the Alaska Supreme Court should be reversed.

Respectfully submitted.

RICHARD A. LEAVY
KWAKU A. AKOWUAH
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

ANDREW L. FREY
Counsel of Record
CHARLES A. ROTHFELD
BRIAN D. NETTER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000
Counsel for Petitioner

MARCH 2009

[13] Valdez also would duplicate taxes imposed by other jurisdictions where ships are held in port because of strike or for repair. See Pet. Br. 47-49. The City is wrong in saying (Br. 50-51) that this is a new argument; petitioner's challenge always has been directed at all aspects of the Valdez formula, including, explicitly, its treatment of repair time. See JA 89 (First Cause of Action); 22, 31 (dry-dock time for specific ships).

AMICUS CURIAE BRIEF

118

No. 08-310

Supreme Court, U.S.
FILED
FEB 2 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF BROADBAND TAX INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DIANN L. SMITH
MARC A. SIMONETTI
MARK W. YOPP
SUTHERLAND ASBILL & BRENNAN LLP
1114 Avenue of the Americas
40th Floor
New York, NY 10036
(212) 389-5000

JEROME B. LIBIN
Counsel of Record
JEFFREY A. FRIEDMAN
ERIC S. TRESH
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., NW
Washington, DC 20004
(202) 383-0100

Counsel for Amicus Curiae

February 2, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 4042BC

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
Throwout Rules Like the One Applied By Valdez Are Facially Unconstitutional Under the Due Process and Commerce Clauses of the U.S. Constitution Because Such Rules Systematically Tax Extraterritorial Values	4
A. An Apportionment Formula With a Throwout Rule Fails On Its Face To Reflect a Rational Relationship To Values Connected With the Taxing Jurisdiction	5
B. A Throwout Rule Deliberately and Systematically Includes Extraterritorial Values in the Tax Base	9
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Adams Express Co. v. Ohio, 166 U.S. 185 (1897) 7
Associated Indus. of Missouri v. Lohman, 511 U.S. 641 (1994) 12
Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977) 10
Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983) 10
Fargo v. Hart, 193 U.S. 490 (1904) 5
Miller Bros. v. Maryland, 347 U.S. 340 (1954) 5
Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) 5, 9
Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 5, 8, 12
Norfolk & W. R. Co. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968) 5
Pfizer, Inc. v. Director, Division of Taxation, 24 N.J. Tax 116 (2008) 7
Pfizer, Inc. v. Director, Division of Taxation, 196 N.J. 590 (2008) 7
Trinova Corp. v. Michigan Dept. of Treasury, 498 U.S. 358 (1991) 12

STATUTES

N.J. Rev. Stat. § 54:10A-6 (2007) 7
N.J. Rev. Stat. § 54:10A-6 (2008) 7
W. Va. Code § 11-24-7(e)(11)(B) 8

OTHER AUTHORITIES

J. Hellerstein & W. Hellerstein, State Taxation (3d ed. 2001-2005) 8
MTC Model Regulation IV.17(4)(C)(b) 9

TABLE OF AUTHORITIES—Continued

Page

MTC Proposed Model Regulation for the Apportionment of Income from the Sale of Telecommunications and Ancillary Services § (3)(ii)(I) 9

Sarah H. Beard, *Maine Governor Proposes Sales Factor Throwout Rule*, State Tax Today, January 29, 2009 9

IN THE

Supreme Court of the United States

No. 08-310

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF BROADBAND TAX INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* [1]

This brief *amicus curiae* in support of petitioner is respectfully submitted on behalf of the Broadband Tax Institute ("BTI"). BTI is a non-profit corporation formed in 1986 to facilitate communication and

[1] Both parties have filed blanket consents with this Court to the filing of briefs by *amicus curiae*. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

cooperation among its members on issues and developments in all areas of tax practice, including property, sales and use, and income taxes that affect the cable and telecommunications industry. BTI is currently composed of approximately 250 industry members and associate consultants, and represents major cable and telecommunications businesses in the United States that are engaged in interstate and international commerce.

This Court has granted *certiorari* in this important case to review the validity of the City of Valdez's *ad valorem* property tax applicable to large vessels engaged in interstate commerce that use the City's docking facilities. Petitioner asserts that the City's port-days apportionment formula (in general, the number of days the vessel is in the City's port divided by the number of days the vessel is in any port during the taxable year) inevitably produces a tax on the value of petitioner's vessel that reflects periods the vessel is in use elsewhere (e.g., on the high seas) and thereby violates the Due Process and Commerce Clauses of the U.S. Constitution.[2]

BTI's members, while not subject to the tax at issue here, are subject to taxes with similarly flawed apportionment rules. Like the formula used by Valdez, the formulas to which BTI's members are subject incorporate a similar geographically-based "throwout" rule. (A throwout rule is a rule that "throws out" of the denominator of the apportionment formula amounts attributable to activities under-

---

[2] The validity of the apportionment formula is one of the two Questions Presented on which this Court granted review. The other issue – whether the Valdez tax violates the Tonnage Clause – will not be addressed by *amicus*.

taken in certain locations, which increases the resulting apportionment in favor of the taxing jurisdiction and thereby systematically attributes extraterritorial value to that jurisdiction.)

Like petitioner, BTI's members believe they are subject to unconstitutional state and local taxation wherever they are subject to a throwout rule. A decision in this case addressing the constitutionality of the Valdez apportionment formula will significantly influence the determination whether other throwout rules will be considered constitutionally infirm.

Amicus is concerned that if the Valdez formula is left unreviewed, or is reviewed without regard to the broader universe of similar throwout rules, its members will continue to be burdened by existing throwout rules and other jurisdictions will be emboldened to adopt similarly inappropriate apportionment methods. The increasing use of throwout rules in other tax areas accentuates the ramifications of the outcome in the instant case.

SUMMARY OF ARGUMENT

The use of a geographically-based "throwout rule" in a taxing jurisdiction's apportionment formula inexorably leads to the attribution of extraterritorial values to that jurisdiction. For that reason, any formula with a throwout rule cannot bear a rational relationship to the activities carried on by the taxpayer in the taxing jurisdiction. Such a formula is therefore facially unconstitutional under the Due Process and Commerce Clauses of the U.S. Constitution. The Valdez port-days rule is a quintessential example of such a formula.

Numerous taxing jurisdictions have adopted varying forms of throwout rules for property taxes, as well as for corporate income and franchise taxes. The Valdez apportionment formula contains a geographically-based throwout rule under which the denominator of the apportionment formula takes into account only total active in-port days and consequently excludes days at sea and days in port for repairs. By "throwing out" of the denominator the number of days at sea, the apportionment formula permits an appropriation by Valdez of a portion of the vessel's value properly associated with the vessel's operations elsewhere. Other apportionment formulas adopt throwout rules with similar effects. These formulas first define the factors that determine the geographical attribution of the tax base (e.g., in-state sales divided by all sales) and then require the disregard (or throwout) of some portion of the denominator *based solely on some other criterion.* The exclusion of such amounts from the denominator of the formula inevitably permits the taxing jurisdiction to tax extraterritorial values. Any such formula should be struck down as constitutionally infirm.

ARGUMENT

Throwout Rules Like the One Adopted By Valdez Are Facially Unconstitutional Under the Due Process And Commerce Clauses Because Such Rules Systematically Tax Extraterritorial Values.

The Due Process and Commerce Clauses prohibit a taxing jurisdiction from taxing extraterritorial values and from taxing value that is not rationally related to the taxpayer's activities in the taxing jurisdiction.

The Due Process Clause requires that there be "some minimum connection" (*Miller Bros. v. Maryland*, 347 U.S. 340, 344 (1954)) between the taxing jurisdiction and the property or activities it seeks to tax and, more importantly for present purposes, a rational relationship between the values that the jurisdiction seeks to tax and taxpayer's intrastate property or activities. *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980); *Moorman Mfg. Co. v. Bair*, 437 U.S. 267 (1978). This Court has found that the minimum connection requirement is met when a taxpayer avails itself of the privilege of conducting business in the state. *Mobil Oil*, 445 U.S. at 437. The more exacting requirement of the Due Process Clause emanates from the mandate that the tax have a rational relationship to the taxpayer's presence in the state.

A. An Apportionment Formula With a Throwout Rule Fails On Its Face To Reflect a Rational Relationship To Values Connected With the Taxing Jurisdiction.

This Court has made it clear that "[a]ny [apportionment] formula used must bear a rational relationship, both on its face and in its application, to property values connected with the taxing State." *Norfolk & W. R. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 325 (1968) (citing *Fargo v. Hart*, 193 U.S. 490, 499-500 (1904)); *see also Moorman Mfg. Co.*, 437 U.S. at 273 ("the income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State,'" (*quoting Norfolk & W.*, 390 U.S. at 325)).

A throwout rule is intentionally designed to "soak up" value from outside the taxing jurisdiction. This

absorption of extraterritorial value cannot be rationally related to the taxpayer's activity in the taxing jurisdiction. Throwout rules systematically create a mismatch between the portion of the tax base assigned to the taxing jurisdiction and the activity actually conducted in that jurisdiction by systematically reassigning to the taxing jurisdiction a portion of the tax base that exists outside that jurisdiction.[3] When an apportionment formula, such as the one at issue here, fails to align the scope of the factors used to apportion the tax base with the realities of that tax base, there ceases to be a rational relationship between the apportioned value being taxed and the activities that generated that value.

Applying the foregoing principles here, respondent may tax that portion of the value of petitioner's ship that fairly reflects its connection to the City (i.e., that fairly reflects the time the ship is in the Valdez port) – but it cannot permissibly tax any greater value. As another example, if the ship is in port in Valdez on 10 different days over the course of a taxable year, Valdez would have a rational claim to tax 2.7% of the ship's value (10 /365 = 2.7%). If, however, the City is allowed to throw out of the denominator certain of the days when the ship has no

---

[3] For example, if a vessel spent 25 days in port in Valdez, 25 days in port in Los Angeles and 315 days on the high seas, a formula that assigned value based on the geographic location of the tax base would assign roughly 7% of the tax base (25/365) to Valdez, 7% to Los Angeles and 86% to the high seas. The Valdez formula throws out the days at sea to take advantage of the fact that there is no taxing jurisdiction for the high seas. The result is to reassign 43% of the tax base to Valdez because its apportionment factor becomes 25/50, thereby allowing it to assert a tax on 50% of the vessel's value even though the vessel was in port there only 7% of the year.

connection to the City (e.g., the days it is on the high seas), the apportionment factor could change dramatically (e.g., 10 /50 = 20%, assuming the ship spends 315 days on the high seas). The exclusion of all non-port days from the apportionment denominator allows the City to capture for itself a substantial portion of the value of the ship even though the ship had contact with Valdez for only 10 days during the year.[4]

The same analysis applies, and the same systematic mismatch between the taxing jurisdiction and the attribution of the tax base occurs, in the context of corporate income tax throwout rules. A corporate income tax throwout rule, like those in New Jersey[5]

---

[4] As this Court has noted in admonishing a taxpayer to consider the totality of its true value, "[b]usiness men do not pay cash for property in moonshine or dreamland." *Adams Express Co. v. Ohio*, 166 U. S. 185, 222 (1897). Days on the high seas are not days in moonshine or dreamland.

[5] New Jersey enacted a throwout rule that excludes from the sales factor denominator sales that are made to purchasers in jurisdictions where the taxpayer is not subject to tax. N.J. Rev. Stat. § 54:10A-6 (2007) This rule is effective for periods beginning on or after January 1, 2002, but repealed for periods beginning on or after July 1, 2010. N.J. Rev. Stat. § 54:10A-6 (2008). The New Jersey Tax Court upheld the facial constitutionality of the throwout rule on May 29, 2008, but reserved making a determination on the constitutionality of the throwout rule as applied. *Pfizer, Inc. v. Director, Division of Taxation*, 24 N.J.Tax 116 (2008). The New Jersey Supreme Court granted a plaintiff leave to file an interlocutory appeal to the New Jersey Court of Appeals before the Tax Court rules on constitutionality as applied. *Pfizer, Inc. v. Director, Division of Taxation*, 196 N.J. 590 (2008). That appeal is pending.

and West Virginia,[6] systematically disregards all sales made to states in which no tax is due, even though the income from those sales has its geographic situs there. Such a rule has the inexorable effect of reassigning income that is geographically associated with other states to states adopting a throwout rule. This reassignment bears no relation to the taxpayer's in-state presence, its use of in-state services and resources, or the benefit it generally derives from the state. Whether or not a taxpayer is taxed in another jurisdiction bears no relation to the value it creates within the taxing state.[7] A state does not gain greater power to tax a nonresident taxpayer merely because the taxpayer's out-of-state activities may not bear any tax in that other state. As has been stated with respect to the port-days formula in the income tax context:

> It is a non sequitur to contend that, because income is not taxable on the high seas, it is "therefore" taxable in the states. States do not acquire the power to tax income earned elsewhere merely because the income is not taxable where it is earned.

J. Hellerstein & W. Hellerstein, State Taxation ¶ 10.03[5] at 10-32 to 10-33 (3d ed. 2001-2005). The validity of an apportionment formula based on time,

---

[6] West Virginia excludes from the sales factor denominator sales that are made to purchasers in jurisdictions where the taxpayer is not subject to tax. W. Va. Code § 11-24-7(e)(11)(B).

[7] This Court has recognized that one state's tax choices in determining the division of income does not bear on the constitutionality of other states' choices. *See Moorman*, 437 U.S. at 278 ("some risk of duplicative taxation exists whenever the States in which a corporation does business do not follow identical rules for the division of income").

mileage, location of property, or location of sales should not be affected by the tax policies of other jurisdictions.[8]

B. A Throwout Rule Deliberately and Systematically Includes Extraterritorial Values in the Tax Base.

In the absence of federal action, this Court has subjected state taxing statutes to a four-pronged analysis in determining their constitutionality under the Dormant Commerce Clause:

1. Is the tax applied to an activity with substantial nexus with the state;
2. Is it fairly apportioned;
3. Does it discriminate against interstate commerce; and

---

[8] See *Mobil Oil Corp. v. Commissioner*, 425 U.S. 425, 444 (1980) ("the constitutionality of a Vermont tax should not depend on the vagaries of New York tax policy"). The Multistate Tax Commission ("MTC") has proposed throwout rules that exclude geographically identifiable values from apportionment factor denominators (*e.g.*, exclusion from the property factor of telecommunications property with situs in non-taxing jurisdictions). MTC Model Regulation IV.17; MTC's Proposed Model Regulation for the Apportionment of Income from the Sale of Telecommunications and Ancillary Services § (3)(ii)(I). The MTC was created by the Multistate Tax Compact, and is an intergovernmental state tax agency that works to assist states in administering taxes that apply to multistate and multinational enterprises. MTC Homepage – About the MTC, http://www.mtc.gov/About.aspx?id=40. Also as part of his proposed 2010-2011 budget, Maine Governor John Baldacci proposed inclusion of a sales factor throwout rule similar to the rules enacted by New Jersey and West Virginia. Sarah H. Beard, *Maine Governor Proposes Sales Factor Throwout Rule*, January 29, 2009, at 17-6.

4. Is it fairly related to the services provided by the state.

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 282 (1977).

In the Commerce Clause context, analysis of the constitutionality of the Valdez apportionment formula necessarily implicates the "fair apportionment" requirement. In articulating this requirement, this Court has observed that an apportionment formula must be both internally and externally consistent. *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983).[9] The "external consistency" requirement bears on the question of whether a state's tax is fairly attributable to economic activity carried on in the taxing state. With regard to "the second and more difficult requirement" *id.*, of fair apportionment, this Court has declared that "external consistency" requires that "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." *Id.*

The Valdez apportionment formula, and all geographically-based throwout rules, flunk the external consistency test because throwout rules systematically result in the taxation of extraterritorial value.

As noted above, the Valdez apportionment formula is applied to determine how much of the vessel's value should be attributed to, and taxed by, respondent. In calculating this apportionment, a fraction is computed based on the number of days the taxpayer's vessel is in port in Valdez divided by the number of days the vessel is in port anywhere.

---

[9] There is no issue here of "internal consistency."

The formula's numerator thereby represents the taxpayer's presence in the port of the taxing jurisdiction and the formula's denominator represents the taxpayer's presence in all ports. Excluded from the denominator are days the vessel spends at sea. Respondent's exclusion of days at sea results in a smaller denominator and thus a larger apportionment in its favor. The increased apportionment attributable to the exclusion thus reflects an increase in taxable value associated entirely with days spent *away* from the taxing jurisdiction – i.e., an extraterritorial value. If intentionally appropriating some portion of value associated with the vessel's presence in another taxing jurisdiction constitutes unconstitutional extraterritorial taxation, as it plainly would, intentionally appropriating some portion of value associated with the vessel's presence on the high seas likewise constitutes unconstitutional extraterritorial taxation.

Assume, for example, under the Valdez port-days formula, that identical Boats A and B have a taxable value of $1 million and are in use for 320 days during the year. Boat A spends 10 days in Valdez and 20 days docked in all ports (including Valdez). Boat B spends 10 days in Valdez and 200 days docked in all ports (including Valdez). Boat A would be taxed by Valdez on *50%* of its value (10 /20 x $1 million = $500,000), while Boat B would be taxed by Valdez on only *5%* of its value (10 /200 x $1 million = $50,000). Thus, Boat A's tax would be 10 times the amount of Boat B's tax even though the two boats have the exact same tax base and have spent the exact same amount of time in the taxing jurisdiction. The only difference is that Boat A spent less time in all ports and more time on the high seas. The extraterritorial reach of the Valdez formula is self-evident.

A formula with a throwout rule is not designed to measure a taxpayer's in-state value. Rather, it is deliberately designed to overstate in-state values. While this Court has given leeway to the states to craft apportionment formulas and has not struck down an apportionment formula because its use might "occasionally" result in the taxation of extra-territorial values, *see Moorman Mfg. Co.*, 437 U.S. at 273, this Court has not previously been confronted with an apportionment formula that is specifically designed to tax extraterritorial values. This type of systematic extraterritorial taxation goes far beyond the minor flaws that are overlooked in a "rough approximation" analysis. *See Trinova Corp. v. Michigan Dept. of Treasury*, 498 U.S. 358, 382 (1991). Rather, like a tax that discriminates against inter-state commerce, a tax attributable to an unfair apportionment formula that, on its face, can be seen as inevitably producing deliberate and systematic extraterritorial taxation should not be allowed to survive, irrespective of the amount of extraterritorial taxation that may be involved. *See Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 650 (1994).

CONCLUSION

For all of the foregoing reasons, the apportionment formula used by Valdez in calculating its *ad valorem* tax should be invalidated as facially unconstitutional under the Due Process and Commerce Clauses.

Respectfully submitted,

DIANN L. SMITH
MARC A. SIMONETTI
MARK W. YOPP
SUTHERLAND ASBILL & BRENNAN LLP
1114 Avenue of the Americas
40th Floor
New York, NY 10036
(212) 389-5000

JEROME B. LIBIN
Counsel of Record
JEFFREY A. FRIEDMAN
ERIC S. TRESH
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Ave., NW
Washington, DC 20004
(202) 383-0100

Counsel for Amicus Curiae

February 2, 2009

AMICUS CURIAE BRIEF

118 (10)

No. 08-310

Supreme Court, U.S.
FILED
FEB 2 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA,
Respondents.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

TODD A. LARD *
DOUGLAS L. LINDHOLM
FREDRICK J. NICELY
BOBBY L. BURGNER
J. HUGH MCKINNON
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5221

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 404ZIV

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE VALDEZ VESSEL TAX IMPERMISSIBLY TAXES EXTRATERRITORIAL VALUE AND IS NOT FAIRLY APPORTIONED IN VIOLATION OF THE COMMERCE AND DUE PROCESS CLAUSES	5
A. The Valdez Vessel Tax Violates the Extraterritoriality Principles Embodied in *Gore*	5
B. The Valdez Vessel Tax Violates This Court's Rulings Specific to Other State Taxes Because it is Not Fairly Apportioned	10
II. A RULING BY THIS COURT ON WHETHER THE VALDEZ APPORTIONMENT FORMULA VIOLATES THE COMMERCE CLAUSE WILL HAVE RAMIFICATIONS WELL BEYOND THE VALDEZ TOWN LIMITS	12
CONCLUSION	14
RELIEF REQUESTED	14

TABLE OF AUTHORITIES

CASES	Page
Bigelow v. Virginia, 421 U.S. 809 (1975)	8
BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996)	8, 10
Bonaparte v. Tax Court, 104 U.S. 592 (1881)	8
Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983)	11
Edgar v. MITE Corp., 457 U.S. 624 (1982)	9
Goldberg v. Sweet, 488 U.S. 252 (1989)	11
MeadWestvaco Corp. v. Illinois Dept. of Revenue, 128 S.Ct. 1498 (2008)	5
Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978)	10
New York Life Ins. Co. v. Head, 234 U.S. 149 (1914)	8
Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995)	11
Pfizer, Inc. v. Division of Taxation, 24 N.J. Tax 116, *appeal granted*, 960 A.2d 388 (N.J. 2008)	14
Trinova Corp. v. Mich. Dep't Treas., 498 U.S. 358 (1991)	5
STATUTES	
N.J. Stat. Ann. 54:10A-5(c)(1)	12
N.J. Stat. Ann. 54:10A-6 (2001)	12
N.J. Stat. Ann. 54:10A-6(B) (2008)	13
TREATISE	
Lawrence H. Tribe, American Constitutional Law § 7-8 at 1064 (3d. ed. 2000)	9

IN THE

Supreme Court of the United States

No. 08-310

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA,
Respondents.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of Petitioner ("Polar Tankers") is filed on behalf of the Council On State Taxation ("COST").[1] COST is a non-profit trade association formed in 1969 to promote equitable and nondiscriminatory state and local taxation of

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

multi-jurisdictional business entities. COST represents more than 600 of the largest multistate businesses in the United States; companies from every industry doing business in every state. COST's members are concerned that Valdez's apportionment formula, which taxes vessels in its port by disregarding time the vessels spend in other locations, will create a dangerous precedent and subject taxpayers to inconsistent and unconstitutional taxation. COST's members are concerned that if left unchecked, Valdez's reliance on an unbalanced apportionment formula will lead states and other localities to adopt similarly unsound theories of taxation, exacerbating multiple taxation of the same income or value.

The Court has granted *certiorari* on this important case to review two issues. The first issue is whether the imposition of the tax violates the Tonnage Clause. The second issue is whether the method used by Valdez to apportion the tax violates the Commerce Clause. While we believe the Alaska Supreme Court clearly erred in concluding that the tax did not violate the Tonnage Clause, the greatest concern of the COST membership is the court's conclusion that the apportionment formula used to apply the tax did not violate the Commerce Clause. COST represents multijurisdictional businesses that routinely pay apportioned taxes, and our members are alarmed by the possibility that a town or state can apply an apportionment formula that is designed to increase its own tax collections by manipulating activity occurring entirely outside of the jurisdiction. Certainty and protection against apportionment methods such as the one used by Valdez are critically important issues to all of COST's membership.

STATEMENT OF THE CASE

In 2000, Valdez adopted a personal property tax (the "Vessel Tax") to compensate for its declining oil and gas property revenues. The Vessel Tax did not apply to all ships arriving in the town harbor, but instead Valdez imposed its Vessel Tax only on vessels 95 feet or greater in length that docked at facilities in the town. The town imposed the Vessel Tax on the "full value" of the vessel, but the value was apportioned by using a fraction where the numerator was the number of days a vessel was docked in Valdez and the denominator was the number of days the vessel was docked in any port in which the vessel could be taxed. The unbalanced Valdez apportionment formula completely disregarded time the vessel was not in a port or when the vessel was in a port where it could not be taxed, which necessarily caused the denominator to fall well short of an expected day-based denominator of 365 days. Not surprisingly, disregarding the days spent away from taxable ports greatly increased Valdez's share of the apportioned property value.

Shortly after Valdez adopted the Vessel Tax, several vessel owners filed a suit attacking its validity. In a 2004 decision, the Alaska Superior Court held that the Vessel Tax violated the Tonnage Clause of the U.S. Constitution without addressing the Due Process and Commerce Clauses. In 2005, the Alaska Superior Court reconsidered and vacated its 2004 decision and ruled, without addressing the Tonnage Clause issue, that the Vessel Tax's apportionment method violated the Due Process and Commerce Clauses of the U.S. Constitution. In 2006, the Superior Court issued its final judgment and held that the Vessel Tax did not violate the Tonnage

Clause but that its apportionment formula, as applied to Polar Tankers, violated the Due Process and Commerce Clauses.

On appeal to the Alaska Supreme Court, Polar Tankers argued that the Vessel Tax violated the Tonnage and Commerce Clauses of the U.S. Constitution. The Alaska Supreme Court ultimately rejected both arguments. According to the Alaska Supreme Court, the Vessel Tax is a fairly apportioned property tax and consequently is not in violation of U.S. Constitution's Tonnage Clause. Additionally, the court held that the Vessel Tax's apportionment method poses no risk of duplicative taxation and therefore is not in violation of the fair apportionment requirement of the U.S. Constitution's Due Process and Commerce Clauses.

SUMMARY OF ARGUMENT

In its application, the Valdez apportionment formula creates situations where a taxpayer's Valdez tax liability can vary not based upon its Valdez activities, but based entirely upon its activities outside of Valdez. Such overreaching by Valdez is not fair apportionment and should not survive constitutional scrutiny. The Valdez Vessel Tax violates this Court's extraterritorial principle by inextricably linking the amount of Valdez tax to the amount of time a vessel might have spent in areas in which a tax cannot be collected. Increasing Valdez tax liability simply because another jurisdiction cannot or chooses not to tax a vessel is an unconstitutional enactment of an extraterritorial law.

The issue of extraterritorial taxation arises not only in Valdez, but also in other areas of state and local taxes. We think it is important to bring to the Court's attention the Vessel Tax reaches beyond the

Valdez town limits, and the ultimate resolution of the issue could greatly influence other state and local taxes well beyond the boundaries of one Alaskan municipality.

ARGUMENT

I. THE VALDEZ VESSEL TAX IMPERMISSIBLY TAXES EXTRATERRITORIAL VALUE AND IS NOT FAIRLY APPORTIONED IN VIOLATION OF THE COMMERCE AND DUE PROCESS CLAUSES

The Petitioner has made sound and logical arguments as to why the application of an apportioned Vessel Tax to property that has not obtained a situs violates the Commerce Clause.[2] We agree with the petitioner's conclusions and will not restate those arguments here. Rather, this brief will focus solely on the extraterritorial encroachment of the Valdez Vessel Tax.

A. The Valdez Vessel Tax Violates the Extraterritoriality Principles Embodied in *Gore*.

During the last term, this Court took the opportunity to reiterate its long-standing principle that "[t]he Due Process and Commerce Clauses forbid the States to tax 'extraterritorial values.'" *Mead-Westvaco Corp. v. Illinois Dept. of Revenue*, 128 S.Ct. 1498, 1502 (2008). Indeed, this court has acknowledged that the taxation of interstate commerce "provide[s] the opportunity for a State to export tax burdens and import tax revenues." *Trinova Corp. v. Mich. Dep't Treas.* 498 U.S. 358, 374 (1991). The Valdez Vessel

---

[2] We also support the Petitioners arguments on the Tonnage Clause, and see no reason to restate those arguments here.

Tax violates this extraterritorial prohibition and exports tax burdens by inextricably linking the amount of Valdez tax to the amount of time a vessel might have spent in areas in which a tax cannot be collected. Increasing Valdez tax liability simply because another jurisdiction cannot or chooses not to tax a vessel is an unconstitutional enactment of an extraterritorial law.

This dispute began when Valdez imposed its 20 mill property tax on the full value of vessels 95 feet and longer while they are docked at the Port of Valdez. Cruise ships, military vessels, and commercial fishing boats are exempt from the levy. In order to address Constitutional uncertainties that had arisen during the initial stages of litigation, Valdez decided to apportion the Vessel Tax rather than impose the tax on the full value. A logical and fair method of apportionment would be to consider the number of days a vessel spends in Valdez as compared to the total number of days in a year. However, Valdez adopted an apportionment formula that bases the tax on the number of days a vessel spends in the Port of Valdez divided by the total days it spends in all ports in which the vessel could be taxed. The apportionment formula effectively excludes all days a vessel spends at sea, days the vessel spends outside of a port waiting to unload its cargo, and days the vessel spends in ports in which it could not be taxed. By dramatically lowering the denominator used in the calculation, Valdez was able to substantially increase the amount of the ship's value apportioned to Valdez, thereby increasing Valdez's tax revenue.

The unbalanced Valdez apportionment formula necessarily increases the amount of tax Valdez collects depending entirely on the activities of a vessel outside

of Valdez. By asserting that Valdez will only consider activity to the extent a vessel is in another taxable port, Valdez has essentially taxed activity outside of Valdez and other taxable ports. It is simply not within Valdez's jurisdiction to assess tax outside of its borders.

A simple scenario illustrates the extraterritorial nature of the Valdez Vessel Tax. Consider the pure example of a vessel that carries the same amount and type of cargo every year. The vessel loads some cargo in Valdez, and during the last two years it had the exact same activities in Valdez. Each year it spent 40 days loading cargo in Valdez. During the first year, the vessel carried its cargo over great distances and spent only 40 days in other taxable ports unloading its Valdez cargo—or perhaps loading and unloading cargo at other ports. During the second year, the vessel made a series of shorter hauls outside of Valdez, which resulted in the vessel spending 80 days in other taxable ports. Although the vessel's contact with Valdez was consistent from year to year, the vessel's tax liability varied dramatically. In year one, the Valdez apportionment formula would assign 50% of the ships value to Valdez. In year two, the apportionment formula would assign only 25% of the value to Valdez.

A vessel operator with consistent and unchanged operations in Valdez, but with increased activity in other ports, might expect to see its tax liability in the other ports change. However, it is certain that the same vessel operator would also unexpectedly see its Valdez tax change solely because of its activities outside of Valdez. In effect, the Valdez apportionment formula creates situations where a taxpayer's Valdez tax liability can vary not based upon

its Valdez activities, but based entirely upon its activities outside of Valdez. Such overreaching by Valdez should not survive constitutional scrutiny.

In a series of cases not involving taxes, this Court has crafted careful limits on the ability of a state or locality to control activities beyond its borders. These cases support a conclusion that neither the activities of businesses in other localities nor the taxing policies of other localities are the proper subject of a Valdez ordinance. While "Congress has ample authority to enact such . . . polic[ies] for the entire Nation, it is clear that no single State [much less a municipality] could do so, or even impose its own policy choice on neighboring states." *See Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . ."). *See also BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571 (1996) (stating that while Congress has the authority to enact policies for the entire nation "it is clear that no single State could do so, or even impose its own policy choice on neighboring States"); *Bigelow v. Virginia*, 421 U.S. 809 (1975) (finding that while Virginia had a legitimate interest in maintaining the quality of medical care services provided within its borders, it had no authority to regulate such services provided in New York); and *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (finding that to permit the statutes of one state to operate beyond the jurisdiction of that state would remove "the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly

dealing with it do not abound"). The "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982).

As *Gore* and its precedents make clear, the fact that other states or localities cannot impose tax on a vessel in port or at sea is not an act Valdez can correct. As the leading Constitutional treatise notes, "the Court has articulated virtually a *per se* rule of invalidity for extraterritorial state regulations—i.e., laws which directly regulate out-of-state commerce, *or laws whose operation is triggered by out-of-state events*." Laurence H. Tribe, American Constitutional Law § 7-8 at 1064 (3d ed. 2000) (emphasis added). It is undisputed that the Valdez Vessel Tax can increase or decrease because of events occurring outside of Valdez, events which have absolutely no relationship to a taxpayer's business activities in Valdez, and have no relationship to the measurement of a vessel's value reasonably attributable to Valdez.

In *Gore*, this Court rejected Alabama's imposition of economic sanctions to induce BMW to change a nationwide policy. The Supreme Court held that the amount of a state punitive damages award could not be based on BMW's failure to disclose presale repairs in other states. Although not a tax case, the similarity to the Valdez Vessel Tax is striking. That is, just as Alabama sought to impose economic sanctions to discourage BMW from nondisclosure of presale repairs in other states, Valdez contends that it may penalize taxpayers who do not pay similar taxes in other ports or while at sea.

In finding Alabama's punitive damages award unconstitutional in *Gore*, the Court held that a "State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *Gore*, 517 U.S. at 571 (citation omitted). While modern commerce may be conducted in such a way that blurs strict geographical boundaries, the boundaries on Valdez's ability to impose tax remain crystal clear. Valdez simply is not permitted to enact an ordinance that is triggered by out-of-state events.

B. The Valdez Vessel Tax Violates This Court's Rulings Specific to Other State Taxes Because it is Not Fairly Apportioned

In addition to contradicting this Court's logic in *Gore*, the Valdez Vessel Tax also runs counter to this Court's established standards for examining the constitutionality of apportioned state taxes. The deliberate use of extraterritorial values to measure the Valdez Vessel Tax violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because the Due Process Clause requires that when a state taxes an interstate business "the income attributed to the State for tax purposes must be rationally related to values connected with the taxing state." *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) (internal quotation omitted). A tax that varies depending on whether a taxpayer is subject to tax in another port or at sea can never be rationally related to values connected with Valdez.

The deliberate extraterritorial reach of the Valdez Vessel Tax also necessarily results in a violation of the fair apportionment requirement of the Commerce Clause because it intentionally increases a taxpayer's Valdez tax liability based upon whether tax was paid in other ports. Although the states are given significant discretion in determining how to apportion income, the "central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 488 U.S. 252, 260-61 (1989). The Valdez Vessel Tax violates the Commerce Clause by purposefully exceeding its "fair share" of a vessel's value related to interstate activities and by ignoring objective measures of activities outside of Valdez.

The Valdez Vessel Tax also violates the external consistency requirement of fair apportionment. *See Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 165 (1983). The requirement of "external consistency" in an apportionment formula specifically looks to "whether a State's tax reaches beyond the portion of value that is fairly attributable to economic activity within the taxing State." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995). Accordingly, Valdez's taxing scheme violates the external consistency requirement by deliberately reaching beyond the portion of a ship's value that is fairly attributable to economic activity within Valdez.

II. A RULING BY THIS COURT ON WHETHER THE VALDEZ APPORTIONMENT FORMULA VIOLATES THE COMMERCE CLAUSE WILL HAVE RAMIFICATIONS WELL BEYOND THE VALDEZ TOWN LIMITS.

The central issue with respect to the application of the Commerce Clause to the Valdez apportionment method is whether the town impermissibly taxed extraterritorial values. Valdez is not alone in its extraterritorial reach, and other states and localities try to tax extraterritorial values and activities. Similar to the Valdez Vessel Tax, these taxes rely on activities or competing tax policies well beyond the borders of the taxing state in order to justify an increased in-state tax liability. These taxes are indeed extraterritorial in nature and a ruling on the Vessel Tax by this Court could very well affect the application of these taxes and ongoing litigation.

A close corollary to the Valdez apportionment formula is the "throwout rule" in New Jersey. The New Jersey Corporation Business Tax is computed on "entire net income," which is "total net income from all sources, whether within or without the United States. . . ." N.J. Stat. Ann. 54:10A-5(c)(1), -4(k) (2008). The apportionment formula, in effect for over 50 years until 2002, apportioned the tax base using a three-factor formula that divided in-state property by "property wherever situated," in-state sales by "the total amount of the taxpayer's receipts," and in-state compensation by compensation of employees and officers "within and without the State." N.J. Stat. Ann. 54:10A-6 (2001). Thus, the portion of a taxpayer's entire net income (and, formerly, entire net worth) attributable to New Jersey was determined

based on the ratio of the taxpayer's in-state activities to its activities everywhere that contributed to the income or value.

In 2002, New Jersey enacted the Business Tax Reform Act of 2002. L. 2002, c. 40, §§ 1 to 33. The "BTRA," as it is commonly called, made a change to the definition of the sales fraction to exclude certain sales from the denominator of the sales fraction. L. 2002, c. 40, § 8 (amending N.J. Stat. Ann. 54:10A-6(B)). Specifically, as amended by the BTRA, the denominator of the sales fraction is now:

> [T]he total amount of the taxpayer's receipts, similarly computed, arising during such period from all sales of its tangible personal property, services, rentals, royalties and all other business receipts, whether within or without the State; provided however, that if receipts would be assigned to a state, a possession or territory of the United States or the District of Columbia or to any foreign country in which the taxpayer is not subject to a tax on or measured by profits or income, or business presence or business activity, then the receipts shall be excluded from the denominator of the sales fraction.

N.J. Stat. Ann. 54:10A-6(B) (2008) (as amended by the BTRA; underscoring shows additional language added by the BTRA).

Thus, a taxpayer affected by this change will have its entire net income apportioned to New Jersey by reference to less than all of the receipts that generated that income. In some cases, this results in a relatively small increase in a taxpayer's factor. In others, it results in a huge increase in the factor. Regardless of the degree of numerical effect of

throwout, taxpayers argue that the throwout rule is unconstitutional because it violates the basic constitutional premise of formulary apportionment.

New Jersey recently repealed its throwout rule, but litigation is still ongoing for the years in which it was operative. *Pfizer, Inc. v. Division of Taxation*, 24 N.J. Tax 116, *appeal granted,* 960 A.2d 388 (N.J. 2008); N.J. Assmb. Bill A2722 (2008). Moreover, the use of throwout in other contexts has started to gain steam. For example, the Multistate Tax Commission has recently approved a model apportionment regulation that removes from the denominator all sales into a jurisdiction in which the taxpayer is not taxable. Massachusetts is currently considering adopting that rule. The Maine Governor has also proposed a throwout rule in his recent 2010 – 2011 biennial budget. Therefore, a ruling by this Court concerning an extraterritorial reach of the Valdez could very well influence these other taxes.

CONCLUSION

In its application, the Valdez apportionment formula creates situations where a taxpayer's Valdez tax liability can vary not based upon its Valdez activities, but based entirely upon its activities outside of Valdez. Such overreaching by Valdez should not survive constitutional scrutiny. The Valdez Vessel Tax violates this Court's extraterritorial principle by inextricably linking the amount of Valdez tax to the amount of time a vessel might have spent in areas in which a tax cannot be collected. Increasing Valdez tax liability simply because another jurisdiction cannot or chooses not to tax a vessel is an unconstitutional enactment of an extraterritorial law.

The issue of extraterritorial taxation arises not only in Valdez, but also in other areas of state and local taxes. We think it is important to bring to the Court's attention the Vessel Tax reaches beyond the Valdez town limits, and the ultimate resolution of the issue could greatly influence other state and local taxes well beyond the boundaries of one Alaskan municipality.

RELIEF REQUESTED

The Council On State Taxation respectfully requests that this Court reverse the decision of the Alaska Supreme Court. This Court's guidance on the limits of extraterritorial taxation will prevent businesses from being subject to multijurisdictional taxation on the same value.

Respectfully submitted,

TODD A. LARD *
DOUGLAS L. LINDHOLM
FREDRICK J. NICELY
BOBBY L. BURGNER
J. HUGH MCKINNON
COUNCIL ON STATE TAXATION
122 C St. N.W., Suite 330
Washington, D.C. 20001
(202) 484-5221

* Counsel of Record

AMICUS CURIAE BRIEF

No. 08-310

IN THE
Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF MULTISTATE TAX COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Joe B. Huddleston, Executive Director
Shirley K. Sicilian, General Counsel
Counsel of Record
Multistate Tax Commission
444 No. Capitol St., N.W., Suite 425
Washington, D.C. 20001-1538
(202) 624-8699

March 4, 2009

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

Neither the Commerce Clause nor the Due Process Clause Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

I. The Due Process Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas 5

A. The Minimal Connection and Rational Relationship Requirements are Met 6

B. The Fair Apportionment Requirement is Met 8

II. The Commerce Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas 13

A. Regulation of State and Local Apportionment Formulas is Best Achieved through State and Local Legislation 14

B. The Dormant Commerce Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases:

Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment, 347 U.S. 590 (1954) 17

Container Corporation of America v. *Franchise Tax Board*, 463 U.S. 159 (1983) ..... *Passim*

General Motors v. Roger W. Tracy, Tax Commissioner of Ohio, 519 U.S. 278, 299 (1997) 13,17

Hans Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931) 9,10,11

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979) 16,17

Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980) 6,8,16,17

Moorman Mfg. Co. v. Bair, 437 U. S. 267 (1978) 6,10,12,14,15

New Energy Co. of Indiana v. *Limbach*, 486 U.S. 269 (1988) 13

Norfolk Western R. Co. v. Missouri Tax Comm'n, 390 U. S. 317 (1968) 6

Oklahoma Tax Comm'n v. *Jefferson Lines*, 514 U.S. 175 (1995) 8,12

Quill Corp. v. *North Dakota*, 504 U.S. 298 (1992) 6,13

Reeves, Inc. v. *Stake*, 447 U.S 429, 437 (1980) 13

Standard Oil Co. v. Peck, 342 U.S. 382 (1952) 17

Underwood Typewriter Co. v. *Chamberlain*,
254 U.S. 113 (1920) 4,10

United States Steel Corp. v. *Multistate Tax Comm'n*,
434 U.S. 452 (1978) 1

Western Live Stock v. Bureau of Revenue,
303 U.S. 250 (1938) 8,13

***Constitution*:**

U.S. Const. amend. XIV, § 1 6

U.S. Const. Art. I, §8, cl. 3 13

U.S. Const., amend. X 13

***Federal Statutes*:**

Title II of Pub. L. No. 86-272, 73 STAT.
555, 556 (1959) 14

H.R. Rep. No. 89-952 (1965) 14

***Other Materials*:**

Multistate Tax Compact, Art. I 2

Multistate Tax Compact Art. VII.1 2

Multistate Tax Commission Reg.
IV.18(Broadcasting) 3

Multistate Tax Commission Reg.
IV.18(Telecommunications) 3

Uniform Division of Income for Tax Purposes Act
§ 10.....10

Uniform Division of Income for Tax Purposes Act
§ 13.....10

Uniform Division of Income for Tax Purposes Act
§ 14.....3,10

Uniform Division of Income for Tax Purposes Act
§ 16(b)(2).....3,10

BRIEF OF MULTISTATE TAX COMMISSION as *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Multistate Tax Commission respectfully submits this brief in support of the City of Valdez, Alaska. The Commission agrees with the City, and the Alaska State Supreme Court, that the "port-day" apportionment formula does not offend either the due process or the commerce clause of the United States Constitution. We do not address the tonnage clause question; however, we note that if the Court were to find that the City's tax is unconstitutional under the tonnage clause, the question of whether the tax is constitutionally apportioned would be moot.

The Commission is the administrative agency for the Multistate Tax Compact, which became effective in 1967 when the required minimum threshold of seven states enacted it.[2] Today, forty-seven states and the District of Columbia participate in the Commission. Twenty of those jurisdictions have adopted the Multistate Tax Compact by statute. Another twenty-eight have joined the Commission as either sovereignty or associate members.[3] The purposes of the Compact

---

[1] No counsel for any party authored this brief in whole or in part. Only *amicus* Multistate Tax Commission and its member states through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member state. Finally, this brief is filed with the consent of the parties.

[2] *See, United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978), upholding the validity of the Compact.

[3] *Compact Members*: Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. *Sovereignty*

are to: (1) facilitate proper determination of State and local tax liability of multistate taxpayers, including equitable apportionment of tax bases and settlement of apportionment disputes, (2) promote uniformity or compatibility in significant components of tax systems, (3) facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration, and (4) avoid duplicative taxation.[4]

Article IV of the Compact contains the Uniform Division of Income for Tax Purposes Act (UDITPA) nearly word for word.[5] UDITPA addresses formulary apportionment for state corporate income and franchise tax bases, and thereby provides a method for the practical application of the unitary business principle to these multistate taxpayers. This Court has recognized the UDITPA formula as "something of a benchmark against which other apportionment formulas are judged." *Container Corporation of America* v. *Franchise Tax Board*, 463 U.S. 159, 170 (1983).

As the administrative agency for the Compact, the Commission is charged with interpretation of Article IV, UDITPA, through promulgation of proposed model uniform regulations.[6] Certain aspects of both UDITPA and the Commission's model regulations could arguably be considered

---

Members: Georgia, Kentucky, Louisiana, Maryland, New Jersey, West Virginia and Wyoming. *Associate Members*: Arizona, Connecticut, Florida, Illinois, Iowa, Indiana, Maine, Massachusetts, Mississippi, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont and Wisconsin.

[4] Compact, Art. I.

[5] UDITPA has been enacted, in whole or in part, by thirty-four states either as a stand alone statute, as part of the Multistate Tax Compact, or both. *See*, Commerce Clearing House, ¶ 11-520, May 27, 2008.

[6] Compact, Art.VII.1.

analogous to aspects of the City's property tax apportionment formula at issue in this case. Specifically, the UDITPA provision that assigns sales to the destination state also re-assigns, or "throws back," those sales to the origination state if the taxpayer does not have nexus in the destination state.[7] And the Commission has adopted two special apportionment formulas, one for broadcasters and one for telecommunications service providers, that exclude outerjurisdictional property (such as undersea cable or satellites) from the property factor and non-nexus sales from the sales factor.[8]

The importance the Commission attaches to this case is twofold. First, many states have adopted UDITPA and the Commission's model special apportionment regulations for broadcasters and telecommunications providers.[9] To the extent the City's property tax and apportionment formula invoke the unitary business principle in ways that are analogous to these Commission provisions, the case may have direct implications for states' corporate income and franchise tax apportionment structures. Nearly from the inception of the corporate income tax, this Court has applied the unitary business principle equally to corporate income and property

---

[7] UDITPA § 16(b)(2).

[8] *See* Multistate Tax Commission Reg. IV.18(h), Special Rules: Television and Radio Broadcasting § 4(ii)(B)(3) (amended Apr. 25, 1996); Ala. Admin. Code r. 810-27-1-4-.18(h); 006-05-006 Ark. Code R. § 2.26-51-718(d), 1 Colo. Code Regs. § 201-3 (Television and Radio Broadcasting Regulations); Haw. Code R. § 18-235-38-06.04; Mont. Admin. R. 42.26.1101-.1103; N.M. Code R. § 3.5.19.18; N.D. Admin. Code 81-03-09-38; *see also* Multistate Tax Commission, Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services §§ 3(i), 3(ii)(I) (approved July 31, 2008); Proposed 830 Mass. Code Regs. 63.38.11.

[9] *Id. See also* Commerce Clearing House, ¶ 11-520, May 27, 2008 (indicating at least 32 states have adopted UDITPA in whole or in part.)

taxes. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U.S. 113, 119-120 (1920). Yet the Court has also recognized differences between the two taxes which can be germane to the application of the principle. *See, e.g., Container Corporation of America* v. *Franchise Tax Board,* 463 U.S. at 187-188.

Second, and more fundamentally, this case is important to the Commission because it may impact states' authority to determine their own tax policies within recognized constitutional limits. The choice of taxpayer activity to be included in, or excluded from, a jurisdiction's apportionment formula is a policy choice of no small consequence. It may reflect that jurisdiction's determination of how best to match taxpayer receipt of the specific benefits the jurisdiction provides, or to cover the type of activity primarily engaged in by the prevalent industry in that jurisdiction. By calling for a judicial determination that a specific category of activity (time outside the jurisdiction) is constitutionally required to be included in an apportionment formula, the Taxpayer in this case is calling for a significant limitation on states' sovereign taxing authority. One of the Commission's primary purposes is to protect state tax sovereignty from interference beyond that which is required under the Constitution.

SUMMARY OF ARGUMENT

The port-days apportionment formula adopted by the City of Valdez does not offend either the due process clause or commerce clause of the U.S. Constitution. The City has determined through its legislative process that the port-day formula reflects the most relevant activity by which to attribute value. Although there may be other formulas that would also reasonably reflect a rough approximation of value, the City's choice is a fair apportionment and is not arbitrary. Nor does the City's formula discriminate or burden interstate commerce. If the City were required to include all days in its formula, some business value would never be subject to tax

and there would be less than full apportionment of the tax base. The creation of this sort of tax advantage for some interstate business would not further the purpose of the commerce clause, which is to preserve competitive national markets.

ARGUMENT

Neither the Commerce Clause nor the Due Process Clause Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

The City's apportionment formula is a single factor ratio of days spent in Port Valdez to days spent in all ports.[10] As such, the formula measures a particular type of taxpayer activity: time spent in port. The formula does not add other factors that might measure additional taxpayer activities, such as time spent in all locations (which would include activity on the high-seas), value of freight handled, or other relative revenue, property or payroll measures. The addition or substitution of any one of these other factors could increase the spectrum of activity covered by the formula and cause the Taxpayer's apportioned share of property value attributed to the City to change. Is the City's formula constitutionally infirm because it fails to reflect one or more of these additional types of taxpayer activity, and in particular the activity occurring on the high-seas? Because the formula (1) apportions value that is rationally related to the activities in the taxing state, (2) is fair, (3) has not been preempted by Congress, and (4) does not discriminate against interstate commerce, the answer is "no."

I. The Due Process Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

---

[10] *See*, Brief for Respondent, City of Valdez, pp. 4-5.

The due process clause prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "Due Process centrally concerns the fundamental fairness of government activity." *Quill Corp.* v. *North Dakota*, 504 U.S. 298, 312 (1992).

A. The Minimal Connection and Rational Relationship Requirements are Met

The due process clause requires two conditions be met in order for a state to tax a portion of the value or income generated by a business operating in interstate commerce. There must be (1) a "minimal connection," or "nexus," between the interstate activities and the taxing state, and (2) a rational relationship between the income or property values attributed to the state and the intrastate values of the enterprise. U.S. Const. amend. XIV, § 1; *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425, 437 (1980); *Moorman Mfg. Co. v. Bair*, 437 U. S. 267, 272-273 (1978); *Norfolk Western R. Co. v. Missouri Tax Comm'n*, 390 U. S. 317, 325 (1968).

The first requirement, nexus, imposes the limitation that a jurisdiction may not tax even a properly apportioned share of the income or values of a unitary business unless at least some part of that business is conducted in the jurisdiction. *Container Corporation of America* v. *Franchise Tax Bd.*, 463 U.S. at 166. Taxpayer has conceded both due process and commerce clause nexus in this case.[11]

The second requirement, regarding a rational relationship, is best thought of as a limitation on the scope of the income or value that may be properly subject to apportionment. This limitation requires that the business's income or value producing activities conducted outside the jurisdiction be related

---

[11] *See*, Brief for Respondent, City of Valdez, p. 33.

in some concrete way to the business's income or value producing activities conducted inside the jurisdiction. *Container Corporation, supra* at 166. That is, the out-of-state activities of the business must be part of the same unitary operation as its in-state activities in order for the income or value arising from the whole of these activities to be properly apportioned together as the income or value of a single unitary business, using a single apportionment formula. The operation of the Taxpayer's vessels on the high-seas is part of a continuous stream of operation that includes the operation of the vessels in the City of Valdez. As long as the vessels' operation on the high-seas is "rationally related" to their operation in Valdez, all of the vessels' value arising from the whole of these operations may be subject to apportionment. Arguments surrounding this requirement should have no direct bearing on the second question presented by this Court: "[w]hether an *ad valorem* property tax that apportions the property's value in proportion to its physical presence and commercial activities in each tax situs violates the Commerce Clause or the Due Process Clause." The Court's inquiry concerns the validity of the apportionment formula, not the scope or sum of the value to which it has been applied.

Though the "rational relationship" requirement may not bear directly on the Court's second inquiry, it does have an indirect bearing. It establishes the scope of the tax base that may be subject to apportionment. In this case, that base should be the value arising from the operation of the vessels. But the Taxpayer's argument that the value of assets *must* be apportioned according to the assets' daily location is tantamount to an argument for geographic accounting as opposed to apportionment.[12] The value arising from employment of an asset in a unitary operation does not necessarily arise evenly wherever the asset is located and however the asset is engaged in those locations. To argue that certain asset value

[12] *See*, Brief for the Petitioner, Polar Tankers, Inc., p. 27.

cannot be apportioned to a particular location because the assets were at times located elsewhere (e.g., activity on the high-seas) assumes value can be geographically assigned based on the assets' physical location. This Court has seen through that proposition. "Because the [operational interconnectedness] that generates the assets' value arises from the operation of the business as a whole, it becomes misleading to characterize the [value of the business's assets] as having a single identifiable 'source.'" *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. at 438. The Taxpayer's proposal in this case would amount to carving out a property tax exemption, an exception to the base of apportionable value, for that value that arises during the time the property is on the high-seas.

B. The Fair Apportionment Requirement is Met

The "nexus" and "rational relationship" requirements of the due process clause guide us in determining the scope of value or income subject to apportionment. They do not directly touch on the apportionment formula, which is the subject of this Court's inquiry. But another requirement of the due process clause does address the apportionment formula directly. That is the requirement of "fair apportionment." *Container Corporation, supra* at 166. Although this Court has often related the fair apportionment requirement to due process, it is actually more of a commerce clause concern. The Court explained in *Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175 (1995) that "this principle of fair share is the lineal descendant of *Western Livestock*'s prohibition of *multiple taxation*, which is threatened whenever one state's act of overreaching combines with the possibility that another State will claim its fair share of the value taxed: the portion of value by which one State exceeded its fair share would be *taxed again* by a State properly laying claim to it." 514 U.S. at 184-185 (1995) (emphasis added), *referring to, Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Aside

from the arguable existence of a home-port rule, which is discussed below with respect to the commerce clause, the Taxpayer is not claiming any potential for taxation by multiple jurisdictions in this case. Rather, the Taxpayer is concerned that the City is taxing a proportionate share of value that arises *outside* of any other taxing jurisdiction.

For an apportionment formula to be fair, it must be both internally and externally consistent. *Container Corporation, supra* at 169. Internal consistency requires a formula that "if applied by every jurisdiction, ... would result in no more than all of the unitary business' [value] being taxed." *Id.* The City's formula clearly meets the internal consistency test. If all jurisdictions used the port-day formula, all business value would be taxed and no more. Clearly, exclusion of outer-jurisdictional activity, by itself, would never cause an apportionment formula to fail the internal consistency test. All value would be taxed under a port-day formula and no more. In contrast, if all jurisdictions were required to apply a formula that includes outerjurisdictional property, as the Taxpayer and its *amici* suggest, some business value would never be subject to tax. There would always be less than full apportionment of the tax base..

External consistency requires "that the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income [or value] is generated." *Id.* Undoubtedly, all activities of a unitary business contribute to the value of its assets and realization of its income. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123, 133 (1931). But no apportionment formula attempts to include all factors reflecting all activity, and a requirement to do so would certainly defeat the usefulness of formulary apportionment as a "rough approximation" of the share of total activity occurring in a jurisdiction, and thus the share of value or income arising from the jurisdiction. *Id.* at 271.

The UDITPA three-factor formula, which this Court has recognized as a "benchmark against which other formulas are to be measured," includes only three types of taxpayer activity: property, payroll and sales. *Container Corporation* at 170. These three factors do not exhaust the entire set of factors arguably relevant to the production of income. *Id.* at 170, fn. 20. And none of these three factors is included in its entirety. The property factor excludes intangible property;[13] the payroll factor has been read to exclude independent contractors;[14] and the sales factor reassigns sales made to the U.S. government on the basis of origination rather than destination.[15] Indeed, this Court acknowledged that "[s]ome methods of formula apportionment are particularly problematic because they focus on only a small part of the spectrum of activities by which value is generated." *Container Corporation* at 170. Nonetheless, this Court has "generally upheld the use of such formulas..." *Id., citing to Moorman Mfg. Co. v. Bair, supra* (upholding a single sales factor formula and its application to a specific taxpayer); *Underwood Typewriter Co.* v. *Chamberlain,* supra (upholding a single property factor formula, which did not include intangible property, and its application to a specific taxpayer). *See also, Hans Rees' Sons, Inc.* v. *North Carolina, supra* at 134 (holding a single tangible property factor to be "fair on its face," but rejecting its application to a specific taxpayer in a particular case as distortive.)

The specific port-day formula at issue in this case does not purport to reflect all activity that might give rise to value. It reflects port-day activity. It does not reflect a myriad of other activities, including activity on the high-seas. As such, the formula simply falls somewhere on this continuum be-

---

[13] UDITPA § 10 (defining the property factor).

[14] UDITPA §§ 13 and 14 (defining the payroll factor). *See also* Multistate Tax Commission Regulation IV.13(a)(3).

[15] UDITPA § 16(b)(2).

tween the relatively robust spectrum of activity included in a three-factor formula and the more circumspect spectrum of activity included in a single-factor formula. Taxpayer's proposed formula is also a single factor formula, and would also fall somewhere on this continuum. The City's formula is not "intrinsically arbitrary." It provides a rough approximation of the value attributable to the City. The City might have chosen an alternative, such as that suggested by the Taxpayer, but the City has determined through its legislative process that the port-day formula reflects the most relevant activity and is the better approximation.

To be sure, the more narrow the spectrum of activity included in an apportionment formula, the more likely the formula will fail to reflect a particular taxpayer's relative amount of activity in the taxing state. This Court held in *Hans Rees'* that "when the [jurisdiction] has adopted a method *not intrinsically arbitrary*, it will be sustained until proof is offered of an unreasonably and arbitrary application *in particular cases*." *Id.* at 133 (emphasis added). And indeed, this Court has "on occasion found the distortive effect of focusing on only one factor so outrageous in a particular case as to require reversal." *Container Corporation, supra at* 182-183; *referring to Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell, supra.* In this case, Polar Tankers has failed to meet its burden to show by clear and cogent evidence that the Valdez apportionment formula results in an assessment of Polar Tankers that is "out of all appropriate proportion to the business transacted by the appellant in that State."[16] *Hans Rees' Sons v. North Carolina ex rel. Maxwell,* 283 U. S. at 135.

Like the "benchmark" UDITPA three-factor formula, as well as the formula proposed by Taxpayer in this case, the City's formula will occasionally over-reflect or under-reflect

---

[16] Brief for Respondent, City of Valdez, pp. 34-40.

value attributable to the City. The formula could under-reflect value to the extent inclusion of some other contributing activity, such as freight handling or payroll, has a relatively stronger presence in the jurisdiction. The Taxpayer's proposed formula, a ratio of port-days to all days, could over-reflect value to the extent the activity reflected by some of those days (e.g., the days at sea) does not give rise to as much value as the activity reflected by other days (e.g., the days in port).

In *Container Corporation*, this Court recognized that the relationship between the activity reflected by a particular factor and the income that activity generates is assumed to be roughly the same for the included factors: "The three-factor formula ... is based in part on the very rough economic assumption that rates of return on property and payroll – as such rates of return would be measured by an ideal accounting method that took all transfers of value into account – are roughly the same in different taxing jurisdictions." *Id.* at fn. 20. The City's apportionment formula here assumes - with justification - that inclusion of days on the high seas in equal proportion to days in port would attribute too much value to days at sea and not enough value to days in port.

Despite the potential for occasional over- or under-reflection of value, "[t]he constitution does not invalidate an apportionment formula whenever it *may* result in taxation of some [value] that did not have its source in the taxing [jurisdiction]." *Id. at 169-170, citing and adding emphasis to Moorman Mfg. Co. v. Bair, supra* at 272. And in this case, Taxpayer is not claiming the value had its source in another "taxing [jurisdiction]" at all. It is claiming the source for some of its income is *not* in any jurisdiction. Aside from the "home-port" question, which is analyzed below with respect to the commerce clause, there is no potential in this case for the type of multiple taxation that gave rise to the due process concern for fair apportionment in the first place. *Oklahoma*

Tax Comm'n v. *Jefferson Lines*, *supra* at 184-185 (1995); *Western Live Stock v. Bureau of Revenue*, *supra*.

II. The Commerce Clause Does Not Require Outer-jurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

The 10th Amendment to the U.S. Constitution limits the federal government's power to regulate to only those matters specifically delegated to it. U.S. Const., amend. X. Other powers are reserved to the states, or to the people. One such federal delegation is contained in the commerce clause, which reserves for Congress the exclusive power "... [t]o regulate Commerce with foreign Nations, and among the several States..." U.S. Const. Art. I, §8, cl. 3. This explicit delegation has long been held to contain a negative inference, restricting State authority, even in the absence of an explicit federal regulation, if the state action would improperly discriminate against or burden interstate commerce. *See, e.g., Quill Corp. v. North Dakota, supra at* 312-313.

The purpose of the commerce clause, and thus the dormant commerce clause, is to prohibit state actions that discriminate against interstate commerce by burdening out-of-state competitors. *See, e.g., Reeves, Inc.* v. *Stake*, 447 U.S 429, 437 (1980); *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269, 273-274 (1988) ("[The] 'negative' aspect of the Commerce Clause prohibits economic protectionism – that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors" (citations omitted)); *General Motors* v. *Roger W. Tracy, Tax Commissioner of Ohio*, 519 U.S. 278, 299 (1997) (referring to "...the dormant Commerce Clause's fundamental objective of preserving national markets for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors").

A. Regulation of State and Local Apportionment Formulas is Best Achieved through State and Local Legislation

The commerce clause affords Congress ample authority to regulate certain aspects of state taxation. This Court specifically suggested in *Moorman* that one of those aspects would potentially be the policy at issue in this case: the appropriate composition of activities included in state apportionment formulas. *Moorman Mfg. Co. v. Bair*, *supra* at 280. According to this Court in *Moorman*, if Congress were substantially convinced that the freedom of states to formulate independent policy in this area must yield to an overriding national interest in uniformity, it could so legislate, consistent with the strictures of the commerce clause. *Id.*

Indeed, Congress has seriously considered doing so. The Willis Committee Report, a 1965 congressional study of state taxation interstate and international commerce mandated by Title II of Pub. L. No. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state corporate income and franchise taxation of interstate and foreign commerce.[17] The Report recommended, among other things, federal legislation to establish a uniform state apportionment formula (based on two equally-weighted factors, property and payroll) and a uniform state tax base (set at federal taxable income).[18] UDITPA and the Multistate Tax Compact were the states' answer to these Congressional recommendations. *See, e.g.*, H.R. Rep. No. 89-952, Pt. VI, at 1143 (1965). Ultimately, after due consideration of all the

---

[17] *See, generally, Interstate Taxation Act: Hearings on H.R. 11798 and Companion Bills Before Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966).

[18] H.R. Rep. No. 952, 89th Cong., 1st Sess., Pt. VI, at 1139*ff* (1965).

political and economic interests that vary from state to state, Congress chose not to regulate or pre-empt the states' ability to set their own apportionment formulas or tax bases.

This Court recognized in *Moorman* that the choice of factors to be included in an apportionment formula is fundamentally a legislative one, and that the difficulty of stepping in where states or local jurisdictions have legislated, and Congress has chosen not to, is prohibitive:

> Accepting appellant's view of the Constitution would require extensive judicial lawmaking. Its logic is not limited to a prohibition on use of a single-factor apportionment formula... a host of other division-of-income problems create precisely the same risk and would similarly rise to constitutional proportions.
> *Id.* at 278.

This Court is not the appropriate forum for weighing local benefits and industry activities and determining how those should be reflected in an apportionment formula. Concerns raised by *amici* regarding which particular activities should be reflected in an apportionment formula are best addressed in state and local legislative processes. Indeed, the Uniform Law Commission is currently considering a cooperative joint project to review its model UDITPA.[19] The Multistate Tax Commission is working simultaneously with the Uniform Law Commission to consider amendments to Art. IV of the Compact, which incorporates UDITPA. These are the better types of forums for considering which activities should be reflected in an apportionment formula.

---

[19] Information regarding this project is available from the Uniform Law Commission at:
http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=302

B. The Dormant Commerce Clause Does Not Require Outerjurisdictional Taxpayer Activity to be Reflected in State and Local Apportionment Formulas

The dormant commerce clause prohibits taxation that results in "discrimination against interstate or foreign commerce." *Container Corporation, supra at 170, citing Mobil Oil Corp., supra,* at 444. This Court has long-identified the potential for multiple taxation as the essence of discrimination and burden on interstate commerce. *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 444 - 448 (1979). The dormant commerce clause might have been construed to impose a requirement on the states that the combination of different apportionment formulas never result in a tax burden higher than what the taxpayer would have incurred if its business were limited to any one of the two jurisdictions. But according to this Court in *Container*, "at least in the interstate commerce context ... the antidiscrimination principle has not in practice required much in addition to the requirement of fair apportionment." *Container Corporation, supra at* 170-171. In essence, the Court has recognized fair apportionment as the solution to the potential for multiple taxation. "In order to prevent multiple taxation of interstate commerce, this Court has required that taxes be apportioned among taxing jurisdictions, so that no instrumentality of commerce is subjected to more than one tax on its full value." *Japan Line, Ltd. v. County of Los Angeles, supra* at 446- 447.

Taxpayer raises the specter that a vestige of the "home-port" doctrine carves out non-jurisdictional income or assets from the pool of tax base subject to apportionment. The fair apportionment solution could be frustrated if there were a home-port rule applicable to interstate commerce. But there is not.[20] "The corollary of the apportionment principle, of

---

[20] *See,* Brief of Petitioner, City of Valdez, pp. 14-15, 18.

course, is that no jurisdiction may tax the instrumentality in full. The rule which permits taxation by two or more states on an apportionment basis precludes taxation of all of the property by the state of the domicile... otherwise there would be multiple taxation of interstate operations." *Standard Oil Co. v. Peck*, 342 U.S. 382, 384-385 (1952) (income); *See also, Mobil* (income)("Taxation [of income] by apportionment and taxation by allocation to a single situs are theoretically incommensurate, and if the latter method is constitutionally preferred, a tax based on the former cannot be sustained."). *Accord, Japan Lines* (property), *supra*.

Because there is no home port rule applicable to interstate commerce, a determination by this Court that outerjurisdictional activity must be included in the apportionment formula would systematically result in less than full apportionment of income or value. Such a rule would go far beyond ensuring that interstate commerce is not disadvantaged. It would create an advantage. Taxpayers with outerjurisdictional property would be provided an anti-competitive tax advantage through the operation of the apportionment formula. For example, to the extent ocean transportation may compete with railroad, truck or air transport, ocean transport would be competitively advantaged. Railroads and trucks operate by necessity only within jurisdictions. Airlines often use a formula similar to a port-day formula. *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization and Assessment*, 347 U.S. 590 (1954). The creation of this sort of tax advantage for ocean transport would not further the purpose of the commerce clause, which is to preserve competitive national markets. *General Motors* v. *Tracy, supra* at 299.

CONCLUSION

The Commission supports the position of the City of Valdez that the port-day formula is fair and does not discriminate against interstate commerce. The Taxpayer's expansive in-

terpretation of the dormant commerce and due process clauses to require inclusion of a particular type of activity in a jurisdiction's apportionment formula would result in unnecessary and burdensome interference with state sovereignty in violation of federalism principles and an anti-competitive tax advantage for certain taxpayers. The judgment of the Supreme Court of Alaska on this ground should be affirmed.

Respectfully submitted,

Joe B. Huddleston, Executive Director
Shirley K. Sicilian, General Counsel
Counsel *of Record*
Multistate Tax Commission
444 No. Capitol St., N.W., Suite 425
Washington, D.C. 20001-1538
(202) 624-8699

March 4, 2009

AMICUS CURIAE BRIEF

113 (6) No. 08-310

Supreme Court U.S.
FILED
FEB 2 - 2009
OFFICE OF THE CLERK

In the
Supreme Court of the United States

♦

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ,
Respondent.

♦

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALASKA

♦

BRIEF OF AMICUS CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONER

♦

Karen R. Harned
Counsel of Record
Elizabeth Milito
NFIB SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 314-2061

Counsel for Amicus Curiae

February 2, 2009

THE LEX GROUP DC ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

BOTH 4BIBTX 84014 21

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE VALDEZ APPORTIONMENT FORMULA CREATES A RISK OF MULTIPLE TAXATION THAT RENDERS THE TAX INVALID UNDER THE COMMERCE AND DUE PROCESS CLAUSES 4

A. The Domicile State Retains the Right to Tax the Vessels for the Time Spent on the High Seas, and Non-domiciliary Jurisdictions Must Not Tax This Same Value 4

B. Small Businesses Face a Greater Risk of Multiple Taxation Than Large Businesses When Subjected to Invalid Apportionment Formulas 7

II. THE VALDEZ APPORTIONMENT FORMULA TAXES EXTRATERRITORIAL VALUES IN VIOLATION OF THE COMMERCE AND DUE PROCESS CLAUSES 8

III. ALLOWING THIS TAX TO STAND WOULD HAVE DELETERIOUS POLICY CONSEQUENCES FOR SMALL BUSINESSES 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

CASES

Ballard v. Comm'r of Internal Revenue,
544 U.S. 40 (2005) 2

Braniff Airways v. Nebraska State Bd. of Equalization & Assessment,
347 U.S. 590 (1954) 10, 11

Central R.R. Co. of Pa. v. Pennsylvania,
370 U.S. 607 (1962) 4, 5, 7, 8

City of Valdez v. Polar Tankers,
182 P.3d 614 (Alaska 2008).....5, 10

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 9

Japan Line, Ltd. v. County of Los Angeles,
441 U.S. 434 (1979) 5, 6, 9, 10

Ledbetter v. Goodyear Tire & Rubber Co., Inc.,
127 S. Ct. 2162 (2007) 2

Marshall v. Barlow's, Inc.,
436 U.S. 307 (1978) 2

MeadWestvaco Corp. v. Illinois Dep't of Revenue,
128 S. Ct. 1498 (2008) 8

Ott v. Mississippi Valley Barge Line Co.,
336 U.S. 169 (1949) 9

Pierce v. Underwood,
487 U.S. 552 (1988) 2

Rapanos v. United States,
547 U.S. 715 (2006) 2

Standard Oil v. Peck,
342 U.S. 382 (1952) 9

Walters v. Metro. Educ. Enters., Inc.,
519 U.S. 202 (1997) 2

UNITED STATES CONSTITUTION PROVISIONS

U.S. CONST. amend. XIV 3

U.S. CONST. art. I, § 8, cl. 3 3

RULES OF COURT

SUP. CT. R. 37.3(a) 1

SUP. CT. R. 37.6 1

OTHER AUTHORITIES

Bruce D. Phillips & Holly Wade,
NFIB Research Foundation,
Small Business Problems and Priorities (2008) 11, 12

United States Small Business Administration, FAQs: Frequently Asked Questions, http://web.sba.gov/faqs/faqindex.cfm?areaID=24 (last visited Jan. 13, 2009) 1

United States Small Business Administration, Office of the Chief Counsel for Advocacy, The Changing Burden of Regulation, Paperwork, and Tax Compliance in the United States: A Report to Congress (1995) 13

W. Mark Crain, United States Small Business Administration, Office of Advocacy, The Impact of Regulatory Costs on Small Firms (2005) 13

William J. Dennis, Jr., *Coping with Regulation*, National Small Business Poll, Vol. 1, Issue 5, 2001, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0038&KT_back=1 ..... 2, 12

William J. Dennis, Jr., *Paperwork and Record Keeping*, National Small Business Poll, Vol. 3, Issue 5, 2003, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0010&KT_back=1 13

William J. Dennis, Jr.,
Tax Complexity and the IRS,
National Small Business Poll,
Vol. 6, Issue 6, 2006, *available at*
http://www.411sbfacts.com/
sbpoll.php?POLLID=0055 12

INTEREST OF AMICUS CURIAE

Amicus, National Federation of Independent Business (NFIB) Small Business Legal Center,[1] is the legal voice of small business in America. As the legal arm of NFIB, the Small Business Legal Center represents the interests of small business in the nation's courts. The Small Business Legal Center participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

NFIB is an organization of more than 350,000 members, located in all 50 states. The members of NFIB are the small businesses that make up the backbone of the American economy. Small businesses account for more than 99 percent of all employers in the country and provide more than one-half of all jobs in our economy. More importantly, two-thirds of new job growth comes from small business. According to the United States Small Business Administration, small business accounts for more than half of the private non-farm gross domestic product in America. United States Small Business Administration, FAQs: Frequently Asked Questions, http://web.sba.gov/faqs/faqindex.cfm?areaID=24 (last visited Jan. 13, 2009).

[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

In addition to providing goods and services in every sector of the economy (including exporting goods to other countries), NFIB members bear a significant portion of the overall national tax burden. In pursuit of its goal to support small business in America, NFIB and the NFIB Small Business Legal Center, which was formerly known as the NFIB Legal Foundation, have participated as amicus curiae in several cases before this Court including *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), *Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40 (2005), *Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202 (1997), *Pierce v. Underwood*, 487 U.S. 552 (1988), and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978).

This case is of particular interest to small businesses, on which the greatest burden of new complex taxing schemes often falls. Small business owners most often identify tax-related regulations as the most burdensome type of regulations with which they must comply. William J. Dennis, Jr., *Coping with Regulation*, National Small Business Poll, Vol. 1, Issue 5, 2001, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0038&KT_back=1.

Because a complex and unfair tax system and burdensome taxes are among the top concerns of small business owners, NFIB is committed to securing fair and equitable tax laws for its members, and ensuring that legislatures abide by constitutional requirements in passing such tax laws. Because the tax at issue in this case is levied

unfairly and in violation of constitutional principles, NFIB has an interest in this case.

SUMMARY OF ARGUMENT

Whether or not the tax at issue violates the Tonnage Clause, the apportionment formula used violates both the Fourteenth Amendment's Due Process Clause and the Commerce Clause of the Constitution. U.S. Const. art. I, § 8, cl. 3. These clauses forbid taxes on extraterritorial values and taxes that impose the risk of multiple taxation. The apportionment formula used by the City of Valdez does both. It creates the risk of multiple taxation and reaches extraterritorial values.

A business's state of domicile may tax all property values that have not attained a tax situs elsewhere. Insofar as Valdez's tax reaches value for time spent beyond its borders, the risk of multiple taxation exists. Small businesses are particularly vulnerable to the risk of multiple taxation since the burden rests with the taxpayer to show that property may be taxed elsewhere. The inordinate expense and time needed to contest a complex tax, such as the Valdez apportionment formula, makes it unlikely that a small entity would undertake such a challenge.

These extraterritorial taxes are not fairly apportioned to the benefits afforded by the taxing state, as required by the Due Process and Commerce Clauses. The benefits the City of Valdez claims it affords the shipping companies are entirely unavailable while the vessels are on the high seas.

A tax, therefore, that reaches value for time spent on the high seas is not fairly apportioned and thus is in violation of the Constitution.

ARGUMENT

I. THE VALDEZ APPORTIONMENT FORMULA CREATES A RISK OF MULTIPLE TAXATION THAT RENDERS THE TAX INVALID UNDER THE COMMERCE AND DUE PROCESS CLAUSES

A. The Domicile State Retains the Right to Tax the Vessels for the Time Spent on the High Seas, and Non-Domiciliary Jurisdictions Must Not Tax This Same Value

The state of domicile only loses its taxing power to the extent that the property has attained a tax situs elsewhere. *See Central R.R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 611-612 (1962). The domicile state may then tax the value of property for all time it is not in another tax situs, including time spent on the high seas. Indeed, from the burden of proof provided in *Central Railroad*, there is a presumption that the domicile state may tax the entire value of the property. Specific property is only exempted when the taxpayer shows that "some portion of its total assets" may be taxed elsewhere. *Id.* at 613.

If another jurisdiction may also tax the property, the risk of multiple taxation arises. *Id.* at

612. Because the Due Process and Commerce Clauses forbid multiple taxation, the non-domiciliary jurisdiction must only tax the portion of the value of the property that has attained a tax situs there. Unconstitutional multiple taxation occurs if the non-domiciliary jurisdiction attempts to tax values that reflect more than the time the property actually spent within the jurisdiction. Here, the apportionment formula effectively taxes not only the value of the vessels for the time they spend in the City of Valdez's jurisdiction, but also the value of the vessels for some portion of the time spent on the high seas. The apportionment formula renders the tax invalid, as it creates the risk of multiple taxation.

The Alaska Supreme Court erred when it relied on *Japan Line v. County of Los Angeles*, 441 U.S. 434 (1979), to reach its decision. The Alaska Supreme Court determined that *Japan Line* precluded taxation by the domicile state for the period when property has no tax situs. *City of Valdez v. Polar Tankers, Inc.*, 182 P.3d 614, 620 n.26 (Alaska 2008). Therefore, under the Alaska court's reasoning, the domicile state is treated no differently from other taxing jurisdictions under *Japan Line*, and all jurisdictions gaining tax situs may tax equally the time spent on the high seas. *City of Valdez*, 182 P.3d at 620 ("Our determination that Valdez has adopted one of the many potential fair apportionment schemes it could choose from renders Polar's assertion of home port superiority irrelevant.").

This is neither a correct statement of the rule in *Japan Line* nor a logical consequence of it. *Japan Line* concerned the constitutionality of an *ad valorem* property tax on foreign-owned property in international commerce. *Japan Line*, 441 U.S. at 435. In declaring that "the home port doctrine . . . has yielded to a rule of fair apportionment among the states," this Court merely stated that movable property can be taxed by its domiciliary state and also by other states through which that property travels. *Id.* at 442. Oceangoing vessels had previously been exempted from apportionment schemes and remained subject to tax only by the domiciliary state. *Id.*

As the case was decided on other grounds, *Japan Line* did not determine whether the apportionment formulas replaced the home port doctrine for domestic oceangoing vessels. *Japan Line*, 441 U.S. at 443. In fact, the decision noted that this Court traditionally permitted the domicile state of oceangoing vessels to tax the entire value of the ship, rather than risk apportioning time spent on the high seas to non-domiciliary jurisdictions through which the vessel may travel. *Id.* at 442. Thus, this Court has long respected the rights of the domicile state to tax the time a vessel spends on the high seas. The dicta of *Japan Line*, on which the Alaska Supreme Court relied, at most suggests that fair apportionment should be applied to oceangoing vessels, an issue which is not debated in the present case. Fair apportionment does not require that the domicile state lose its right to tax the values of property having no other tax situs.

B. Small Businesses Face a Greater Risk of Multiple Taxation Than Large Businesses When Subjected to Invalid Apportionment Formulas

Subtle apportionment formulas that allow extraterritorial taxing create a greater risk of multiple taxation for small businesses. The burden rests with the taxpayer to show that its property may be taxed in another jurisdiction and is thus outside the taxing power of the domicile state. *Central R.R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 613 (1962). For large businesses with sophisticated resources and teams of lawyers and accountants, determining and proving that some portion of the value of their property may be subject to tax elsewhere and then challenging the tax may well be a feasible task. The difficulty of identifying a risk of multiple taxation is compounded for small businesses with few resources and limited interstate commerce expertise. Of those small businesses that can identify the risk, even fewer will have the extensive resources necessary to bring their cases to court or carry their burdens of proof in complex tax litigation.

Tax complexity is a great burden to America's small businesses, and one that is increasing rapidly. Courts help small businesses when unnecessary complexity is eliminated and tax schemes are made as intuitive as possible. Here, the complexity of the tax also increases the risk of unconstitutional multiple taxation. A small business could predict that its property is subject to tax by other states for

the time it is physically present in those states. It is not predictable, nor indeed should it be, that the property would be subject to tax by other states for times it is outside the borders of those states. Because small businesses often do not have the means to readily identify or to challenge an apportionment formula that taxes for time spent outside of the jurisdiction, these businesses are at a much greater risk of multiple taxation.

II. THE VALDEZ APPORTIONMENT FORMULA TAXES EXTRATERRITORIAL VALUES IN VIOLATION OF THE COMMERCE AND DUE PROCESS CLAUSES

A non-domiciliary jurisdiction may only tax that portion of property that has attained a tax situs there and may not tax extraterritorial values. *See MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 128 S. Ct. 1498, 1502 (2008). According to *Central Railroad*, a tax situs is established by "sufficient contact" with the jurisdiction. *Central R.R. Co. of Pa. v. Pennsylvania*, 370 U.S. 607, 615 (1962). It is not the entirety of the property, but rather "some determinable portion of the value" of the movable property that attains a tax situs in a non-domiciliary jurisdiction. *Id.* at 613. While the property is on the high seas, it has no contact with other jurisdictions, and thus it cannot acquire an extra-domiciliary tax situs. This means that while on the high seas, the vessels do not acquire a tax situs in the City of Valdez. To the extent that the apportionment formula captures time spent on the high seas, Valdez taxes extraterritorially.

The Due Process and Commerce Clauses require that the tax be "fairly apportioned" to the benefits provided by the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 174 (1949). The tax must "in practical operation [have a] relation to opportunities, benefits, or protection conferred or afforded by the taxing State." *Ott*, 336 U.S. at 174. While the vessels are in Valdez's port, the employees of the ships utilize municipal resources, including health care facilities and the airport. Brief in Opposition at 1, *Polar Tankers, Inc. v. City of Valdez*, No. 08-310 (Nov. 10, 2008). Hospitals, roads, and the airport are not used, however, when the ship is on the high seas. Thus a tax imposed for this time is not fairly apportioned.

Formulas from other cases that this Court has recognized to be fairly apportioned accurately reflect the time the property was present in the non-domiciliary jurisdiction. In *Ott v. Mississippi Valley Barge Line Co*, 336 U.S. 169, 171 (1949), the taxing authority calculated the challenged tax using a ratio of the number of miles of lines in Louisiana out of the total number of miles in the entire line. In *Standard Oil*, this Court recognized the *Ott* formula as "one which fairly apportioned the tax to the commerce carried on within the state." *Standard Oil v. Peck*, 342 U.S. 382, 383 (1952). In *Japan Line*, this Court ultimately struck down the tax. The decision approved, however, the apportionment formula applied by the non-domiciliary state of California, which roughly equaled the weeks the property was present in California. In approving

this calculation, this Court explained that "California effectively apportions its tax to reflect the container's 'average presence,' i.e., the time each container spends in the State per year." *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 & n.8 (1979).

The Alaska Supreme Court found support for upholding the apportionment formula from *Braniff Airways* insofar as it viewed the apportionment formula used by Nebraska in *Braniff* and the formula used by the City of Valdez as analogous. *City of Valdez v. Polar Tankers*, 182 P.3d 614, 620-621 (Alaska 2008). In *Braniff Airways* an out-of-state air carrier subject to tax in Nebraska did not challenge the apportionment formula that Nebraska used, so the issue of the tax's reasonableness was not before the Court. *Braniff Airways v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 591 (1954). Moreover, the formula used in *Braniff* was the average of three ratios, only the first of which bears even a superficial similarity to the formula at issue in this case: (1) the ratio of landings and departures in Nebraska to all landings and departures per year; (2) the ratio of revenue tons handled at Nebraska airports to that handled by all airports per year; and (3) the ratio of originating revenue in Nebraska to all originating revenue per year. *Id.* at 593 n.4. The Alaska Supreme Court found that "[t]here is not too much difference between landings and dockings, nor between dockings and days in port." *City of Valdez*, 182 P.3d at 620. The court failed to appreciate, however, that every one of the air carrier's planes will make a stop at an airport virtually every day it is in operation.

Therefore, the ratio of landings in Nebraska to all landings would be essentially equal to days in Nebraska out of all days of operation. The distinction between daily airport landings and ships making port calls after weeks on the high seas negates any support from *Braniff*.

Small businesses are uniquely interested in seeing that the Commerce and Due Process Clauses are enforced in this area. Small businesses may be reluctant to engage in interstate commerce if non-domiciliary states can impose extraterritorial taxes. The uncertainty alone of what other states could tax may deter small businesses with limited resources from entering interstate commerce.

III. ALLOWING THIS TAX TO STAND WOULD HAVE DELETERIOUS POLICY CONSEQUENCES FOR SMALL BUSINESSES

A ruling that this tax is constitutional could negatively impact businesses across the country by encouraging other state and local governments to utilize similar apportionment formulas. Comparable taxes might, for example, affect smaller trucking or shipping firms that move across state lines.

When considering the constitutionality of this tax, this Court should be mindful of the complexity of the overall tax environment in which small businesses operate. In a 2008 survey of the problems and priorities facing small businesses, four of the top 10 ranked problems were tax related. Bruce D. Phillips & Holly Wade, NFIB Research

Foundation, *Small Business Problems and Priorities* 8 (2008). Property taxes – the category into which the challenged Alaska tax and other similar measures would fall – ranked fourth on the list. Twenty-five percent of small business owners polled indicated that property taxes are a critical problem. *Id.*

Tax complexity ranked fifth among small business owners' top concerns, with 23 percent of small business owners citing tax complexity as a critical problem for their businesses. *Id.* Navigating the federal and state tax codes has become so complex that 88 percent of small business owners now hire paid tax preparers or accountants. *Id.* Unsurprisingly, in another NFIB survey, small business owners identified tax-related regulations – federal, state, and local – as the most burdensome type of regulation. William J. Dennis, Jr., *Coping with Regulation*, National Small Business Poll, Vol. 1, Issue 5, 2001 at 1, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0038&KT_back=1. *See also*, William J. Dennis, Jr., *Tax Complexity and the IRS*, National Small Business Poll, Vol. 6, Issue 6, 2006, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0055 (analyzing small business owners' struggles with the Internal Revenue Code).

The costs of compliance with complex tax laws are immense, and small businesses bear a disproportionate share of the burden. In 2003, NFIB members reported spending an average of $74.24 per hour on tax related paperwork. William J. Dennis, Jr., *Paperwork and Record Keeping*, National Small Business Poll, Vol. 3, Issue 5, 2003, *available at* http://www.411sbfacts.com/sbpoll.php?POLLID=0010&KT_back=1. A Small Business Administration study also indicated that complex tax systems disproportionately burden small firms: the cost of tax compliance is 67 percent higher in small firms than it is in large firms. W. Mark Crain, United States Small Business Administration, Office of Advocacy, The Impact of Regulatory Costs on Small Firms (2005). In the only study available in the United States on the impact of tax-related paperwork on all firms by firm size, the Tax Foundation reported that the smallest firms spent 0.5 percent of their sales on tax compliance activity; the largest firms spent less than 0.1 percent of their sales on tax paperwork. *Cited in* United States Small Business Administration, Office of the Chief Counsel for Advocacy, The Changing Burden of Regulation, Paperwork, and Tax Compliance in the United States: A Report To Congress (1995). Similarly, a 1995 Hopkins and Diversified study showed that the smallest firms (those with fewer than 50 employees) spent closer to 5 percent of revenue on tax compliance costs. Cited in *Id.*

A decision to uphold the Valdez apportionment method would improperly expand local taxing authority at the expense of out-of-state interests and interstate commerce. Similar tax

apportionment methods would be eagerly adopted by other state and local governments looking to maximize tax revenue in today's tight economic climate. Such a result would negatively impact businesses of all sizes. Small business owners, however, would disproportionately feel the impact of such taxes as small firms are least able to navigate and challenge complex tax structures. Given that small business owners already operate within an exceedingly complex tax environment, any such additional taxes would feel like the proverbial extra straws pressing against the camel's back.

CONCLUSION

For the foregoing reasons, the judgment by the Alaska Supreme Court should be reversed.

Respectfully Submitted,

Karen R. Harned
Counsel of Record
Elizabeth Milito
NFIB SMALL BUSINESS LEGAL CENTER
1201 F St., N.W., Suite 200
Washington, D.C. 20004
(202) 314-2061

Counsel for Amicus Curiae

AMICUS CURIAE BRIEF

No. 08-310

IN THE
Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF THE STATES OF ALASKA, ALABAMA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, IDAHO, MARYLAND, MASSACHUSETTS, MONTANA, NEW JERSEY, NORTH CAROLINA, OHIO, UTAH, WASHINGTON, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

RICHARD SVOBODNY
Acting Attorney General
CRAIG J. TILLERY
JOANNE M. GRACE
STATE OF ALASKA
DEPARTMENT OF LAW
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-2133

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
DANIEL G. BIRD
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amici Curiae

(Additional Counsel Listed On Inside Cover)

March 4, 2009

TROY KING
Alabama Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130

DUSTIN MCDANIEL
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street
Denver, Colorado 80203

RICHARD S. GEBELEIN
Chief Deputy Attorney General
for the State of Delaware
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

BILL MCCOLLUM
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1050

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

DOUGLAS F. GANSLER
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

MARTHA COAKLEY
Massachusetts Attorney
General
One Ashburton Place
Boston, Massachusetts 02108

STEVE BULLOCK
Attorney General of Montana
P.O. Box 201401
Helena, Montana 59620-1401

ANNE MILGRAM
Attorney General
State of New Jersey
Hughes Justice Complex
P.O. Box 080
25 Market Street
Trenton, New Jersey 08625

ROY COOPER
Attorney General of
North Carolina
Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

RICHARD CORDRAY
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah 84114-2320

ROBERT M. MCKENNA
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504-0100

DARRELL V. MCGRAW, JR.
West Virginia Attorney General
Office of the Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

BRUCE A. SALZBURG
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE CITY OF VALDEZ'S PORT-DAYS METHOD OF APPORTIONMENT IS CONSTITUTIONAL 5

A. This Court Has Established Bedrock Principles Of Multi-Jurisdiction Taxation That Confirm The Correctness Of The Alaska Supreme Court's Decision Below 5

1. All jurisdictions in which property has obtained a tax situs may assess a fairly apportioned tax on that property 6

2. States have substantial latitude in devising apportionment formulas 8

3. The taxpayer bears the burden of proving that a facially valid apportionment formula is unconstitutional as applied 9

4. Polar Tankers asks this Court to adopt and apply new taxation rules that are contrary to precedent 11

B. Port-Days Methods Of Apportionment Permissibly Tax Property In Interstate Commerce Based On The Opportunities Provided By The Taxing Jurisdiction 15

1. States across the country employ port-days and similar apportionment formulas 15

2. Valdez's port-days apportionment formula is constitutional on its face ... 17

3. Valdez's port-days apportionment formula is constitutional as applied to Polar Tankers 23

C. Before This Court, Polar Tankers Has Significantly Expanded The Scope Of Its Challenge 26

II. VALDEZ'S AD VALOREM PROPERTY TAX IS NOT A DUTY OF TONNAGE 27

A. The Tonnage Clause Is Narrow In Scope And Does Not Preclude Property Taxes On Vessels 27

B. Polar Tankers Misapprehends What Constitutes A Duty Of Tonnage 30

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment, 347 U.S. 590 (1954) 8, 12, 13, 22, 30

Central R.R. of Pennsylvania v. Pennsylvania, 370 U.S. 607 (1962) 8, 12, 18, 19, 21

Clyde Mallory Lines v. Alabama, 296 U.S. 261 (1935) 27, 28, 31

Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734 (1978) 32

Fargo v. Hart, 193 U.S. 490 (1904) 14

Goldberg v. Sweet, 488 U.S. 252 (1989) 8, 20, 21

Hicks v. Miranda, 422 U.S. 332 (1975) 12

Huse v. Glover, 119 U.S. 543 (1886).....27, 30

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) 6, 7, 8

Johnson Oil Ref. Co. v. Okalahoma ex rel. Mitchell, 290 U.S. 158 (1933)..... 30

Luckenbach S.S. Co. v. Franchise Tax Bd., 33 Cal. Rptr. 544 (Dist. Ct. App. 1963), *appeal dismissed*, 377 U.S. 215 (1964) 12, 16, 19, 20, 25

MeadWestvaco Corp. v. Illinois Dep't of Revenue, 128 S. Ct. 1498 (2008).....5, 6, 11, 26

Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) 27, 31, 32

Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954) 30

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 2, 6, 8, 9, 12, 13, 18, 20, 21, 22, 23

Norfolk & Western Ry. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968).....6, 7, 8, 9, 10, 11, 13, 14, 20, 23, 25

Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949) 2, 6, 7, 12, 13, 23

Pfizer Inc. v. Director, Div. of Taxation, 24 N.J. Tax 116, *appeal granted*, 960 A.2d 388 (N.J. 2008)..... 16

Pittsburgh, C., C. & St. L. Ry. v. Backus, 154 U.S. 421 (1894) 9, 10, 11, 14, 25

Pullman Co. v. Richardson, 261 U.S. 330 (1923) 7

Pullman's Palace-Car Co. v. Pennsylvania, 141 U.S. 18 (1891) 6

Quill Corp. v. North Dakota ex rel. Heitkamp, 504 U.S. 298 (1992) 5, 30

R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130 (1986)..... 12

Sea-Land Serv., Inc. v. Comptroller of Treasury, No. 1620, 1984 WL 2910 (Md. Tax Ct. Dec. 18, 1984) 16

Southern Ry. Co. v. Kentucky, 274 U.S. 76 (1927) 14

Standard Oil Co. v. Peck, 342 U.S. 382 (1952) 8, 22

State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204 (1870) 27-28, 29

The Passenger Cases, 48 U.S. (7 How.) 283 (1849) 31

Transportation Co. v. Wheeling, 99 U.S. 273 (1878) 28, 29, 30, 31

Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) 14, 15

Union Tank Line Co. v. Wright, 249 U.S. 275 (1919) 14

United States v. County of Allegheny, 322 U.S. 174 (1944) 12

United States v. Salerno, 481 U.S. 739 (1987)..... 18

Wallace v. Hines, 253 U.S. 66 (1920) 14, 25

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184 (2008) 17-18, 20

Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) 7, 8

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const.:

Art. I:

§ 8, cl. 3 (Commerce Clause).....2, 5, 20

§ 10:

Cl. 2 (Import-Export Clause).....27, 31

Cl. 3 (Tonnage Clause) .. 4, 27, 29, 30, 31, 32

Amend. XIV, § 1 (Due Process Clause) 2, 5, 20, 30

26 U.S.C. § 4471 28

Alaska Stat.:

§ 43.20.071(a) 15

§ 43.52.210 28

§ 43.52.230 28

Neb. Rev. Stat. § 77-1245 15

N.J. Rev. Stat. § 54:10A-6 16

72 Pa. Stat. Ann. § 7401(3)(2)(d)(1) 15

W. Va. Code § 11-24-7(e)(11)(B) 16

Ala. Admin. Code r. 810-27-1-4.18(8) 16

006-05-006 Ark. Code R. § 2.26-51-718(d) 16

1 Colo. Code Regs. § 201-3 16

Haw. Code R. § 18-235-38-06.04 16

830 Mass. Code Regs. 63.38.11 (proposed) 16

Mont. Admin. R. 42.26.1101-42.26.1103 16

N.M. Code R. § 3.5.19.18 16

N.D. Admin. Code 81-03-09-38 16

CBJ Code (Juneau):

§ 69.20.020 28

§ 69.20.120(a) 28

Valdez Mun. Code § 3.12.070(A) 29

OTHER MATERIALS

Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* (3d ed. 2000) 7

Multistate Tax Commission, Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services §§ 3(i), 3(ii)(I) (approved July 31, 2008) 16

Multistate Tax Commission Reg. IV.18(h), Special Rules: Television and Radio Broadcasting § 4(ii)(B)(3) (amended Apr. 25, 1996) 16

INTEREST OF *AMICI CURIAE*

Amici curiae Alaska, Alabama, Arkansas, Colorado, Delaware, Florida, Idaho, Maryland, Massachusetts, Montana, New Jersey, North Carolina, Ohio, Utah, Washington, West Virginia, and Wyoming ("*Amici* States") are sovereigns that tax the income and property of businesses engaged in interstate commerce. *Amici* States therefore have an interest in addressing the broad arguments made by petitioner Polar Tankers, Inc. and its *amici curiae* regarding (1) permissible formulas for apportioning interstate value among taxing jurisdictions, and (2) the scope of the Tonnage Clause. As relevant here, *Amici* States seek to defend respondent City of Valdez's ad valorem property tax and port-days apportionment method, both of which resemble tax provisions found in tax codes across this nation.

Amici States are not all coastal states able to tax oceangoing vessels, nor do *Amici* States use identical apportionment methods. Yet, regardless of their differences, *Amici* States all share a common understanding of this Court's jurisprudence regarding multi-jurisdiction taxation, as well as considerable practical experience taxing entities engaged in interstate commerce across multiple jurisdictions. *Amici* States urge the Court to apply the clear principles of its jurisprudence and to affirm the judgment of the Alaska Supreme Court.

SUMMARY OF ARGUMENT

I. The port-days method of apportionment the City of Valdez employs, under which oceangoing vessels are taxed according to the number of days spent in Port Valdez in proportion to the number of days spent in all ports, is a fair method of apportionment under the Due Process and Commerce Clauses.

A. This Court has established three fundamental principles of multi-jurisdiction taxation that apply here and confirm the correctness of the decision below. *First*, when property has a tax situs in multiple taxing jurisdictions, each jurisdiction may impose on the property a "fairly apportioned" tax related to the opportunities the jurisdiction provides. *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 172-74 (1949). *Second*, because taxing jurisdictions have wide latitude in enacting apportionment formulas, a formula that provides a "rough approximation" of value attributable to a taxing jurisdiction is constitutional on its face. *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273-74 (1978). *Third*, a taxpayer's as-applied challenge to an apportionment formula will succeed only upon a showing by "clear and cogent evidence" that the formula has "led to a grossly distorted result." *Id.* at 274 (internal quotation marks omitted).

Polar Tankers ignores those principles and asks this Court to adopt different rules that have no basis in precedent. *First*, Polar Tankers erroneously conflates taxing extraterritorial value, which is prohibited, with taxing the in-state value of property that happens also to move outside the state, which this Court has long permitted. *Second*, it is not the law, as Polar Tankers claims (at 36-37), that the "aim" and "approximate result" of an apportionment

formula must be to tax property's proportionate physical presence within a taxing jurisdiction. Rather, the value attributable to each taxing jurisdiction need only have some connection to the entire panoply of opportunities that jurisdiction provides.

B. Applying this Court's bedrock principles of multi-jurisdiction taxation here, the City's formula is constitutional both on its face and as applied to Polar Tankers.

First, the formula on its face reasonably presumes that the jurisdictions in which property has acquired a tax situs provide all of the opportunities of which the property avails itself, so that those jurisdictions may apportion the full value of the property among themselves. *Second*, apportioning a vessel's value using a port-days formula acknowledges the significant productive values that the ports of embarkation and debarkation supply to the entire voyage. Were it not for those ports, time spent on the high seas would be barren of profit. Moreover, contrary to Polar Tankers' claim, this Court has never invalidated a method of apportionment on its face due to a mere hypothetical possibility of duplicative taxation. Thus, Valdez's port-days formula is constitutional on its face.

Valdez's formula is likewise constitutional as applied to Polar Tankers. Valdez provides the single most important commercial opportunity of which Polar Tankers avails itself — the loading of hundreds of millions of barrels of oil worth billions of dollars. Polar Tankers' vessels are valuable *because* of the opportunities that the City affords, in addition to the services and facilities available to the vessels and their crew while in port. Polar Tankers has failed to produce compelling evidence, as it must, that the

City's valuation and apportionment grossly distort the portion of the vessels' value attributable to the opportunities the City provides.

Polar Tankers' arguments to the contrary misapprehend this Court's apportionment jurisprudence. In fact, the premise of Polar Tankers' argument — that, unlike a calendar-days formula, a port-days formula taxes a vessel for time on the high seas — is counterfactual and contrary to this Court's holding that the Constitution does not compel a particular method of apportionment.

II. The City's ad valorem property tax likewise does not run afoul of the Tonnage Clause. That clause is a narrow provision that prohibits taxes on the privilege of entering port and engaging in commerce. The Tonnage Clause does not preclude levies, like Valdez's, that tax property based on its value. Nor does the Tonnage Clause contain a nondiscrimination principle, as Polar Tankers claims. This Court has never struck down a property tax on the ground that it discriminated against vessels. To the extent this Court has made any suggestion that such a tax must be nondiscriminatory, it has done so only to reinforce the purpose of the Tonnage Clause and prevent discrimination among goods bound for different states, not to prevent discrimination among types of property. In any event, Valdez's property tax is nondiscriminatory.

ARGUMENT

I. THE CITY OF VALDEZ'S PORT-DAYS METHOD OF APPORTIONMENT IS CONSTITUTIONAL

The Due Process and Commerce Clauses limit states' authority to tax out-of-state activities. *See MeadWestvaco Corp. v. Illinois Dep't of Revenue*, 128 S. Ct. 1498, 1505 (2008). The requirements of the two Clauses are related, *see Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 313 n.7 (1992), and Polar Tankers challenges Valdez's ad valorem property tax under both on the ground that the tax is not fairly apportioned. *See MeadWestvaco*, 128 S. Ct. at 1505 ("[t]he broad inquiry subsumed in both constitutional requirements is whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state") (internal quotation marks omitted).

A. This Court Has Established Bedrock Principles Of Multi-Jurisdiction Taxation That Confirm The Correctness Of The Alaska Supreme Court's Decision Below

The Alaska Supreme Court's decision accords with three fundamental principles of multi-jurisdiction taxation that are firmly rooted in this Court's Due Process Clause and Commerce Clause jurisprudence and that compel affirmance of the decision below. In seeking reversal, Polar Tankers ignores those principles, which apply to property and other taxes alike, and asks this Court to apply new rules, unmoored to longstanding precedent.

1. *All jurisdictions in which property has obtained a tax situs may assess a fairly apportioned tax on that property*

When property has a tax situs in multiple jurisdictions, each jurisdiction may impose on the property a fairly apportioned tax that reflects the opportunities provided by the jurisdiction. *See Norfolk & Western Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 323 (1968) ("It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise.").[1]

In the nineteenth and twentieth centuries, this Court eroded and ultimately abandoned the "home port doctrine" — under which vessels were taxable solely by the owner's domicile state — and permitted non-domicile states to impose taxes "fairly apportioned to the commerce carried on within the State." *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169, 172-74 (1949) (permitting non-domicile state to tax vessels that travel "on inland waters" that acquire situs in the state); *see, e.g., Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18, 26 (1891) (rail cars). Although this Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), observed that it "consistently ha[d] distinguished the case of oceangoing vessels," the Court made clear that the theory underlying the "home port doctrine" has "fallen into desuetude" and that the doctrine, "as a

---

[1] This same rule applies to income and other taxes. *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978) ("[T]he income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'") (quoting *Norfolk & Western Ry.*, 390 U.S. at 325); *see also MeadWestvaco*, 128 S. Ct. at 1506 (citing cases upholding "taxation by apportionment of net income, dividends, capital gain, and other intangibles").

rule for taxation of moving equipment, has yielded to a rule of fair apportionment among the States." *Id.* at 442; *see* Jerome R. Hellerstein & Walter Hellerstein, *State Taxation* ¶ 4.12[2][c] (3d ed. 2000) (discussing this Court's "complete[ ]" "reject[ion]" of the home port doctrine).

The rule of fair apportionment recognizes that all jurisdictions in which mobile property has a tax situs provide commercial opportunities to the property and, therefore, are entitled to tax a portion of the property's value to facilitate the provision of those commercial opportunities. *See Ott*, 336 U.S. at 174 (holding that a tax that is "fairly apportioned to the commerce carried on within the State" satisfies the requirement that "the tax in practical operation ha[ve a] relation to opportunities, benefits, or protection conferred or afforded by the taxing State"); *see also supra* note 1.

In other words, a jurisdiction with authority to tax personal property may impose a tax that "bears fiscal relation to protection, opportunities and benefits given by the state." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Moreover, the value a state apportions to itself for tax purposes "may be ascertained by reference to the total system of which the intrastate assets are a part," as well as "a portion of the intangible, or 'going-concern,' value of the enterprise." *Norfolk & Western Ry.*, 390 U.S. at 323-24; *see Pullman Co. v. Richardson*, 261 U.S. 330, 338 (1923) ("[T]he tax may be made to cover the enhanced value which comes to the property in the state through its organic relation to the [interstate] system.").

As a "corollary" to the rule of fair apportionment, when property has a tax situs in multiple jurisdic-

tions, "no jurisdiction may tax the instrumentality in full." *Japan Line*, 441 U.S. at 447. In other words, contrary to the "home port doctrine," "the domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State." *Central R.R. of Pennsylvania v. Pennsylvania*, 370 U.S. 607, 614 (1962); *see Braniff Airways, Inc. v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 601 (1954) (same).

The reason for this corollary rule is straightforward: if property has sufficient contact with a non-domicile jurisdiction to acquire a tax situs there, it cannot be that all of the opportunities afforded to the property are attributable to the domicile state. *See Standard Oil Co. v. Peck*, 342 U.S. 382, 385 (1952) ("Otherwise there would be multiple taxation of interstate operations and the tax would have no relation to the opportunities, benefits, or protection which the taxing state gives those operations."). Accordingly, it makes no difference whether the property "*is* subjected to tax elsewhere" or merely "*could* be," *Central R.R.*, 370 U.S. at 614; each jurisdiction is entitled to tax only that portion of the value that "bears fiscal relation" to the opportunities it affords, *J.C. Penney*, 311 U.S. at 444.

2. *States have substantial latitude in devising apportionment formulas*

"States have been permitted considerable latitude in devising formulas to measure the value of tangible property located within their borders." *Norfolk & Western Ry.*, 390 U.S. at 324; *see Moorman*, 437 U.S. at 274 (same with regard to income taxes). The Constitution does not impose any single method of apportionment. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) ("we have long held that the Constitution

imposes no single [apportionment] formula on the States") (alteration in original; internal quotation marks omitted).

This second fundamental principle recognizes "the practical difficulties involved" in apportioning value among taxing jurisdictions to arrive at "an exact measure of value." *Norfolk & Western Ry.*, 390 U.S. at 327, 329. Accordingly, this Court's decisions "do not require any close correspondence between the result of computations" under a formula "and the value of property actually located in the State." *Id.* at 327. It follows that an apportionment formula is fair — and, therefore, constitutional *on its face* — so long as it provides a "rough approximation" of the value attributable to the opportunities the taxing jurisdiction provides. *Moorman*, 437 U.S. at 273.

3. *The taxpayer bears the burden of proving that a facially valid apportionment formula is unconstitutional as applied*

For a taxpayer to show that a formula that on its face fairly apportions value or income among states is nevertheless unconstitutional *as applied* to the taxpayer, the taxpayer has the heavy burden of showing by "clear and cogent evidence" that the formula has "led to a grossly distorted result" or that the results of the formula are "out of all appropriate proportion to the business transacted." *Moorman*, 437 U.S. at 274 (internal quotation marks omitted); *see Norfolk & Western Ry.*, 390 U.S. at 326 (as-applied challenge must show that the formula "has resulted in . . . gross overreaching, beyond the values represented by the intrastate assets purported to be taxed").

For example, in *Pittsburgh, Cincinnati, Chicago & St. Louis Railway v. Backus*, 154 U.S. 421 (1894)

("*PCC&S Railway*"), this Court upheld the validity of Indiana's "mileage formula" as a basis for apportioning and taxing the value of rail cars. The mileage formula provided that "rolling stock shall be listed and taxed in the several counties . . . in the proportion that the main track used or operated in such county . . . bears to the length of the main track used or operated by such person, company, or corporation." *Id.* at 427 (ellipses in original; internal quotation marks omitted). After establishing that the formula was valid on its face, *see id.* at 427-32, the Court held that it was valid as applied to the railway, even though "the valuation was increased from $8,538,053 in 1890 to $22,666,470 in 1891," because there was no evidence of wrongdoing by Indiana and no compelling evidence from the taxpayer of a more accurate valuation, *see id.* at 432-37.

By contrast, in *Norfolk & Western Railway*, this Court struck down the use of a mileage formula as applied. The Court first noted that it had, "in various contexts, permitted mileage formulas as a basis for taxation," *see* 390 U.S. at 326 (citing *PCC&S Railway*), and confirmed "the vastness of the State's taxing power and the latitude that the exercise of that power must be given before it encounters constitutional restraints," *id.* In that case, however, the Court found that Norfolk & Western had "borne [its] burden" of demonstrating that Missouri's mileage formula resulted in "gross overreaching." *Id.* In particular, Norfolk & Western demonstrated that Missouri's formula inexplicably valued property at more than twice its value the preceding year and that the formula "postulat[ed]" that roughly 8 percent of Norfolk & Western's rolling stock was in Missouri, when, in fact, the railway proved that the number

was much closer to 2-3 percent. *Id.* at 326-27. And "the record [wa]s totally barren of any evidence . . . which might offset the devastating effect of the demonstrated discrepancy." *Id.* at 327.

Thus, *PCC&S Railway* demonstrates that an as-applied challenge will fail when the taxpayer relies only on a discrepancy among valuations, whereas *Norfolk & Western Railway* establishes that a taxpayer's as-applied challenge may succeed where the taxpayer presents compelling evidence of the property's value properly attributable to the state, particularly where (as in *Norfolk & Western Railway*) that evidence is unrebutted by the taxing jurisdiction.

4. *Polar Tankers asks this Court to adopt and apply new taxation rules that are contrary to precedent*

Polar Tankers ignores those three, firmly rooted principles of multi-jurisdiction taxation and asks this Court to craft new, unprecedented rules that will handcuff taxing jurisdictions and unreasonably shelter from taxation income and property engaged in interstate commerce.

a. First, Polar Tankers erroneously conflates taxing extraterritorial value, which is prohibited, with taxing the in-state value of property that also moves outside the state, which this Court has long permitted. *See* Pet. Br. 34-39.

It is beyond dispute that a jurisdiction may not tax "extraterritorial value." *See, e.g., MeadWestvaco*, 128 S. Ct. at 1502. But it is likewise settled that, once property has acquired a tax situs in a jurisdiction,[2]

---

[2] Polar Tankers correctly asserts that "'the power to tax is predicated upon jurisdiction of the property.'" Pet. Br. 33

that jurisdiction may tax the portion of the property's full value that is attributable to opportunities, benefits, and protections the jurisdiction provides, regardless of where else the property may be located at various times throughout the year. *See, e.g., Ott*, 336 U.S. at 174-75; *see also Moorman*, 437 U.S. at 272-73.

Thus, an important distinction exists between extraterritorial *value* and extraterritorial *location*. Polar Tankers conflates the two and erroneously concludes that a jurisdiction unconstitutionally taxes extraterritorial value whenever it assigns to itself a proportion of the property's value that is greater than the proportion of time the property spends within that jurisdiction. That contention, however, ignores the principle that a jurisdiction with authority to tax property in interstate commerce may tax all of the "values 'reasonably attributable' to activity within" the taxing jurisdiction without violating the prohibition on taxing "extraterritorial values." *Luckenbach S.S. Co. v. Franchise Tax Bd.*, 33 Cal. Rptr. 544, 550 (Dist. Ct. App. 1963), *appeal dismissed*, 377 U.S. 215 (1964) (per curiam) (dismissing "for want of a substantial federal question").[3] Value attributable to a jurisdiction is not necessarily (or even often)

(quoting *United States v. County of Allegheny*, 322 U.S. 174, 184 (1944)). That is, a non-domicile jurisdiction does not have authority to tax property until the property has sufficient contact with the jurisdiction to acquire a situs there. *See Central R.R.*, 370 U.S. at 614; *Braniff*, 347 U.S. at 599-601. But there is no dispute here that Valdez has authority to tax Polar Tankers' property. *See* Pet. App. 8a.

[3] As Valdez notes (at 35), such a dismissal by this Court is a disposition on the merits that is entitled to precedential weight. *See R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 150 n.20 (1986); *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

directly correlated to the amount of time the property spends in that jurisdiction.

Due process, moreover, requires only a sufficient connection between the taxing jurisdiction and the thing taxed (*i.e.*, situs), and that "'the tax in practical operation ha[ve] relation to opportunities, benefits, or protection conferred or afforded by the taxing State.'" *Braniff*, 347 U.S. at 600-01 (quoting *Ott*, 336 U.S. at 174); *see Moorman*, 437 U.S. at 273 ("rough approximation"). In evaluating a challenge to an income tax much like Polar Tankers' challenge to Valdez's property tax, this Court in *Moorman* affirmed the validity of those "two restrictions on a State's power to tax" and rejected as "foreclosed by prior decisions of this Court" the "claim that the Constitution invalidates an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State." 437 U.S. at 272-73.

b. Second, quoting *Norfolk & Western Railway*, Polar Tankers asserts that "taxation of property not located in the taxing State is constitutionally invalid," 390 U.S. at 325, and argues that "an apportionment formula is valid only if its aim, as well as its approximate result, is to tax property on the basis of its actual proportionate presence within the taxing jurisdiction." Pet. Br. 36-37. However, the cases do not support that claim.

In *Norfolk & Western Railway*, this Court invalidated Missouri's mileage-based apportionment formula as applied to the railway because there was an inexplicable discrepancy between the property's assessed value and its actual value, as established by the taxpayer's evidence, *see* 390 U.S. at 326-28, not because the tax was out of proportion with the prop-

erty's physical presence in Missouri.[4] Moreover, in prohibiting "[t]he taxation of property not located in the taxing State," *id.* at 325, the Court was referring to property that has not acquired a tax situs within the state, as the cases the Court cited make clear. *See Wallace v. Hines*, 253 U.S. 66, 69 (1920) ("allowing a State to look beyond its borders when it taxes the property of foreign corporations . . . [to] get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess"); *Southern Ry. Co. v. Kentucky*, 274 U.S. 76, 83 (1927) (same); *Fargo v. Hart*, 193 U.S. 490, 499 (1904) ("[W]hen . . . property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state.").[5]

---

[4] Indeed, the Court acknowledged the possibility that, as in cases like *PCC&S Railway*, there could be some explanation for the discrepancy, such as the property's "organic relation to the [interstate] system" or "going-concern or intangible value." 390 U.S. at 324, 327 (alteration in original; internal quotation marks omitted). However, there was no record evidence supporting such explanations, and the Court therefore invalidated the tax as applied to Norfolk & Western. *See id.* at 327-28.

[5] Polar Tankers also relies on *Union Tank Line Co. v. Wright*, 249 U.S. 275 (1919), and *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 113 (1920), *see* Pet. Br. 34-37, but neither case supports Polar Tankers here. In *Union Tank Line*, the Court invalidated Georgia's mileage formula as applied to Union Tank Line because the formula was "appraised according to an arbitrary method," such that the tax assessed bore no relation "to real value," 249 U.S. at 283, not because the tax bore no relation to physical presence. In *Underwood Typewriter*, this Court *upheld* Connecticut's tax on profits of a Delaware corporation headquartered in New York because "[t]he corporation [did] not

For these reasons, this Court should reject the erroneous propositions Polar Tankers asserts, and should instead rely upon the fundamental principles of multi-jurisdiction taxation it has long applied. As the Supreme Court of Alaska recognized, when Valdez's ad valorem property tax is evaluated in light of these three fundamental principles of multi-jurisdiction taxation, its constitutionality cannot be questioned.

B. Port-Days Methods Of Apportionment Permissibly Tax Property In Interstate Commerce Based On The Opportunities Provided By The Taxing Jurisdiction

1. *States across the country employ port-days and similar apportionment formulas*

Consistent with the second fundamental principle of multi-jurisdiction taxation, *see supra* Part I.A.2, numerous states employ port-days and similar apportionment formulas in taxing a portion of property, income, or sales in interstate commerce. For example, both Alaska and Pennsylvania use port-days formulas to determine the portion of income from watercraft engaged in interstate commerce that is attributable to, and subject to corporate income tax in, a taxing jurisdiction. *See* Alaska Stat. § 43.20.071(a); 72 Pa. Stat. Ann. § 7401(3)(2)(d)(1); *see also* Neb. Rev. Stat. § 77-1245 (apportioning value of aircraft based on in-state percentages of take-offs and landings, passengers and cargo, and revenue originated). Other states, including New Jersey and West Virginia, have apportionment formulas that similarly divide the total value of taxable

---

even attempt[]" to show that the tax was arbitrary, 254 U.S. at 121, not because the tax bore a sufficient relation to the taxpayer's presence in the state.

sales among taxing jurisdictions, excluding sales made to purchasers in jurisdictions where the taxpayer is not subject to tax. *See* N.J. Rev. Stat. § 54:10A-6; W. Va. Code § 11-24-7(e)(11)(B). And similar laws that do not apportion taxable value to non-taxing jurisdictions have been proposed by the Multistate Tax Commission and adopted by many states.[6]

The Alaska Supreme Court is not alone in affirming the constitutionality of such formulas, as other state courts have upheld income-tax apportionment formulas that include a port-days allocation similar to Valdez's. *See Sea-Land Serv., Inc. v. Comptroller of Treasury*, No. 1620, 1984 WL 2910 (Md. Tax Ct. Dec. 18, 1984) (upholding use of port-days apportionment formula for income tax); *Luckenbach*, 33 Cal. Rptr. at 549 (same); *cf. Pfizer Inc. v. Director, Div. of Taxation*, 24 N.J. Tax 116 (upholding facial validity of N.J. Rev. Stat. § 54:10A-6), *appeal granted*, 960 A.2d 388 (N.J. 2008). *Amici* States are aware of no federal or state court decision striking down a port-days apportionment formula as unconstitutional.

Polar Tankers' *amici*, however, seek not only an unprecedented ruling that would invalidate port-

---

[6] *See* Multistate Tax Commission Reg. IV.18(h), Special Rules: Television and Radio Broadcasting § 4(ii)(B)(3) (amended Apr. 25, 1996); Ala. Admin. Code r. 810-27-1-4.18(8); 006-05-006 Ark. Code R. § 2.26-51-718(d); 1 Colo. Code Regs. § 201-3 (Television and Radio Broadcasting Regulations); Haw. Code R. § 18-235-38-06.04; Mont. Admin. R. 42.26.1101-42.26.1103; N.M. Code R. § 3.5.19.18; N.D. Admin. Code 81-03-09-38; *see also* Multistate Tax Commission, Model Regulation for Apportionment of Income from the Sale of Telecommunications and Ancillary Services §§ 3(i), 3(ii)(I) (approved July 31, 2008); 830 Mass. Code Regs. 63.38.11 (proposed).

days formulas, but also a broad ruling that could call into question numerous other state apportionment formulas. *See* Br. of Council on State Taxation 12-14; Br. of Broadband Tax Institute 7-9 & n.8. In doing so, Polar Tankers and its *amici* essentially argue that the only lawful method of apportioning taxable value is to divide the total value of a piece of property equally over the 365 calendar days in a year. In advancing that erroneous position, they offer no reason for this Court to abandon well-settled precedent and to read into the Constitution a requirement that calendar-days apportionment be used. *Amici* States therefore urge this Court to reject the broad approach Polar Tankers and its *amici* advocate, which encourages additional lawsuits challenging similar apportionment formulas in state courts across the country.

2. *Valdez's port-days apportionment formula is constitutional on its face*

Contrary to the claims of Polar Tankers and its *amici*, a port-days apportionment formula — such as the City of Valdez's — provides, on its face, a rough approximation of the opportunities a taxing jurisdiction affords to a taxed entity and, therefore, is a fair method of apportionment. That is particularly true where, as here, a taxing jurisdiction has provided taxpayers a procedure to present evidence challenging the accuracy of the jurisdiction's rough approximation.

a. To the extent Polar Tankers challenges the constitutionality of Valdez's port-days formula on its face, it "can only succeed . . . by 'establish[ing] that no set of circumstances exists under which the Act would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Washington State Grange*

v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (brackets in original). Polar Tankers has not even *attempted* to show that Valdez's port-days apportionment formula never results in a constitutionally permissible rough approximation of value attributable to Valdez.[7] For that reason alone, this Court should uphold the facial validity of Valdez's port-days apportionment formula.

b. In all events, a port-days method of apportionment provides a permissible "rough approximation" of taxable value that is "rationally related to values connected with the taxing State." *Moorman*, 437 U.S. at 273 (internal quotation marks omitted).

First, as Polar Tankers concedes (at 32-33), if "property has had insufficient contact with States other than the owner's domicile to render any one of these jurisdiction a tax situs," then "it is surely appropriate to presume that the domicile is the only State affording the opportunities, benefits, or protection which due process demands as a prerequisite for taxation." *Central R.R.*, 370 U.S. at 612 (internal quotation marks omitted). In that instance, the "tangible property . . . may be taxed to its full value by the owner's domicile." *Id.*

Likewise, when a taxpayer's property has a tax situs in *multiple* jurisdictions, it is "appropriate to presume" that those jurisdictions *together* afford all

---

[7] Indeed, despite all of its *hypothetical* apportionments and the alleged disparity in percentage apportionments, *see* Pet. Br. 28-30, Polar Tankers asserts only that the formula results in a "substantial" "inflationary effect," *id.* at 30. Such an allegation fails to establish that Valdez's formula never results in a permissible rough approximation. It therefore is insufficient to invalidate Valdez's apportionment formula on its face.

of the commercial opportunities, benefits, and protections that the taxpayer's vessels enjoy. *Id.* Thus, the "full value" of the owner's "tangible property" should be apportioned among *all* of the taxing jurisdictions that "afford[] the opportunities, benefits, or protection which due process demands as a prerequisite for taxation." *Id.* (internal quotation marks omitted). The Valdez formula does just that, for it expressly limits the ports used in the denominator to those "where the vessel *has acquired a situs for taxation.*" Pet. App. 55a (emphasis added).

Second, apportioning a vessel's value using a port-days formula "acknowledges the productive values supplied to the entire voyage, including the high seas sector, by activities within [each taxing jurisdiction]." *Luckenbach*, 33 Cal. Rptr. at 549 (upholding California's port-days formula for allocating a portion of a taxpayer's net corporate income from interstate operation of oceangoing vessels). A taxing jurisdiction could conceivably use a variety of ways to measure and apportion value, including time, location, and production. *See id.* Although "[e]conomic activity in the transportation industry moves in all three of these dimensions," *id.*,[8] a vessel transporting cargo in interstate commerce on the high seas finds its value predominantly in its cargo, *see id.* ("Were it not for the productive potential acquired at the port of departure and liquidated at the port of destination, the high seas portion of the time-space continuum

---

[8] *See* 33 Cal. Rptr. at 549 ("Activity occurring at a particular location and within a particular time span may have been produced by activity at a different place and earlier time; and it might produce no profit at all except for the fact that it will result in further activity at a third location during a third time span.").

would be barren of profit."). Thus, when a taxing jurisdiction uses a port-days formula, it "is taxing not extraterritorial values, but values 'reasonably attributable' to activity within [the jurisdiction]." *Id.* at 550; *see also Norfolk & Western Ry.*, 390 U.S. at 323-24 (holding that the value a state apportions to itself for tax purposes "may be ascertained by reference to the total system of which the intrastate assets are a part," as well as "a portion of the intangible, or 'going-concern,' value of the enterprise").

For both reasons, the Valdez port-days formula is fairly apportioned on its face and comports with the Due Process and Commerce Clauses. Any remaining doubt about the facial validity of the Valdez formula should be erased in light of the City's procedure allowing a taxpayer to petition for use of "another apportionment formula" and to present evidence of "the portion of the total value of the vessel that should be apportioned" to Valdez. Pet. App. 56a. As in *Moorman*, that process ensures resolution of apportionment questions without premature judicial intrusion. *See* 437 U.S. at 275 ("The Iowa statute afforded appellant an opportunity to demonstrate that the single-factor formula produced an arbitrary result in its case. But this record contains no such showing and therefore the Director's assessment is not subject to challenge under the Due Process Clause."); *see also Goldberg*, 488 U.S. at 265 ("[T]he risk of multiple taxation is low, and actual multiple taxation is precluded by the credit provision.").

c. Rather than attempt to demonstrate that Valdez's tax is facially invalid because it "is unconstitutional in *all* of its applications," *Washington State Grange*, 128 S. Ct. at 1190 (emphasis added), Polar Tankers argues just the opposite — that the mere

hypothetical possibility of "potentially duplicative taxation . . . require[s] invalidation of the Valdez apportionment formula," Pet. Br. 41. That is not the law.

This Court has never held that the mere hypothetical possibility of duplicative taxation is sufficient to invalidate an apportionment formula on its face. To the contrary, this Court has said that two jurisdictions' taxes may lawfully *overlap*, with each taxing the same portion of value. *See Moorman*, 437 U.S. at 277-78 & n.12 ("[e]ven assuming some overlap" among two jurisdictions' apportionments, if the challenged jurisdiction "treats both local and foreign concerns with an even hand[,] the alleged disparity can only be the consequence of the combined effect of [both jurisdictions'] statutes, and [the challenged jurisdiction] is not responsible" for the disparity); *see also Goldberg*, 488 U.S. at 263-64 ("[A] limited possibility of multiple taxation, however, is not sufficient to invalidate the [state's] statutory scheme"). It follows that Polar Tankers' unsupported claim (at 41) that other jurisdictions are merely "entitled" to levy duplicative property taxes on the vessels necessarily fails to demonstrate that Valdez's tax is unconstitutional.

The only case on which Polar Tankers relies to support its risk-of-duplicative-taxation theory is *Central Railroad*, in which this Court stated that a "domiciliary State is precluded from imposing an ad valorem tax on any property to the extent that it *could* be taxed by another State." 370 U.S. at 614. However, the "could be" language in *Central Railroad* does not serve to *invalidate* potentially duplicative taxes of non-domicile states, as Polar Tankers supposes, but rather to *limit* the otherwise broad

authority of *domicile* states to tax mobile property and thereby to give domicile and non-domicile states equal taxing authority. *See Braniff*, 347 U.S. at 601 ("'The rule which permits taxation by two or more states on an apportionment basis *precludes* taxation of all of the property by the state of domicile.'") (quoting *Standard Oil*, 342 U.S. at 384) (emphasis added); *supra* pp. 6-8.

In all events, Polar Tankers presents no evidence of actual duplicative taxation. To the contrary, before the Valdez City Council, "Mr. Leon Vance, counsel for the protesting shippers, conceded that none of these vessels were in fact taxed by any other taxing jurisdiction." JA 52. Polar Tankers makes no contrary representation to this Court.[9] Thus, Polar Tankers' argument regarding the so-called risk of duplicative taxation has no basis in fact or law, and this Court has no reason to validate it.[10]

---

[9] Even if Polar Tankers could show some actual evidence of duplicative taxation, which it has not even attempted to do, the proper course would be to present that evidence to Valdez in the first instance, not to this Court. *See* Pet. App. 56a. Although Polar Tankers states that it has petitioned the City to apply a different apportionment formula to its vessels, *see* Pet. Br. 6, Polar Tankers did not provide the City with any evidence of duplicative taxation when it did so, *see* JA 21-45; *Moorman*, 437 U.S. at 275 (rejecting taxpayer's challenge because state statute "afforded appellant an opportunity to demonstrate that the [apportionment] formula produced an arbitrary result in its case," but "this record contains no such showing").

[10] Polar Tankers also claims that Valdez's apportionment formula creates an unconstitutional risk of duplicative taxation because it "excludes from the denominator of its apportionment formula days when vessels are in another port but undergoing repairs or idled by a strike." Pet. Br. 48. However, such days are likewise excluded from the formula's numerator, which means that Valdez denies *itself* the ability to increase its appor-

3. *Valdez's port-days apportionment formula is constitutional as applied to Polar Tankers*

Because Polar Tankers concedes that Valdez is a proper taxing situs for Polar Tankers' vessels, *see* Pet. App. 11a, Valdez is entitled to impose a fairly apportioned property tax on the value of Polar Tankers' vessels. *See Ott*, 336 U.S. at 174. The question here is whether Valdez's tax is, in fact, fairly apportioned as applied to Polar Tankers. It is. Polar Tankers has not carried its heavy burden of demonstrating by "clear and cogent evidence" that Valdez's port-days formula leads to a "grossly distorted result" as applied to the facts of this case. *Moorman*, 437 U.S. at 274 (internal quotation marks omitted); *Norfolk & Western Ry.*, 390 U.S. at 326.

a. The City provides numerous opportunities and benefits to Polar Tankers and its vessels. *See generally* Resp. Br. 5-8. Most importantly, *hundreds of millions* of barrels of crude oil worth *billions of dollars* are loaded onto vessels each year at Port Valdez and then transported to various West Coast refineries. *See* Cert. Opp. 1, 7. The significance of that opportunity, which Valdez provides as the northernmost ice-free port in North America, *see* JA 74, cannot be overstated. That oil is why Polar Tankers built its oil tankers, sends those tankers to Valdez, and values its tankers at hundreds of millions of dollars. *See* Cert. Opp. 7.

---

tionment of the value taxed based on days that ships lie in Port Valdez during repairs or a labor strike. *See* Pet. App. 55a. By excluding such days from both the numerator and the denominator of its apportionment formula, Valdez maintains a sufficiently accurate "rough approximation" to pass constitutional muster.

Beyond the massive commercial opportunity that the ability to load oil in Valdez represents, Valdez provides countless benefits, protections, and services to Polar Tankers' vessels and their crews while the vessels are in Port Valdez, including the use of public facilities, docking services and facilities, and provision of port security and emergency response measures, among many others, all of which facilitate Polar Tankers' profitable commercial activities. *See* JA 74-77.

b. In contrast to its arguments regarding *hypothetical* malapportionment, Polar Tankers devotes scant attention to the "record evidence" in claiming that Valdez's port-days formula has, "in fact," produced "clearly excessive" tax assessments. *See* Pet. Br. 40-41. The "record evidence" Polar Tankers cites is nothing but a series of percentage calculations for the years 1999-2002 comparing assessments using the port-days formula and a calendar-days formula. That numbers game is beside the point, for the entire exercise rests on Polar Tankers' erroneous premise that a calendar-days method of apportionment is the only lawful method of apportioning its vessels' values among taxing jurisdictions.

Polar Tankers proffers no factual basis for its assumption that the only proper way to apportion a tax fairly is to divide the value of property equally over 365 days and then to assign values to jurisdictions based on the number of days the property is located in each jurisdiction. Yet the entire basis for Polar Tankers' claim of malapportionment is that the port-days method results in a different apportionment than the calendar-days method. Polar Tankers offers no independent measurement of the vessels' commercial opportunities actually attributable to Valdez, nor

does it explain why it believes the value attributable to Valdez is limited to the number of calendar days spent in Valdez.

In fact, a calendar-days method of apportionment is not necessarily more accurate than a port-days method. All portions of a voyage are not equal in value, as a calendar-days method assumes. *See Wallace*, 253 U.S. at 69 (finding "plain" the "injustice of assuming the value" of railroads "to be evenly distributed according to main track mileage," when "the great and very valuable terminals of the roads are in other States"). As explained above, a port-days formula determines a ship's taxable value based on opportunities and benefits attributable to the jurisdictions in which the ship takes port and that *make the property valuable in the first place*. *See Luckenbach*, 33 Cal. Rptr. at 549. In contrast, Polar Tankers' calendar-days method of apportionment depends entirely on where a ship is located each day of the year and ignores the commercial and productive opportunities that taxing jurisdictions provide. Because Polar Tankers' argument rests on an erroneous factual predicate, the constitutional challenge must fail.

In any event, because this Court has never required an apportionment formula to "result[] in an exact measure of value," *Norfolk & Western Ry.*, 390 U.S. at 329, a mere difference between two methods of apportionment — like that on which Polar Tankers relies — does not establish that either is unconstitutional, *see, e.g.*, *PCC&S Ry.*, 154 U.S. at 432-37 (upholding mileage-based formula even though "the valuation was increased from $8,538,053 in 1890 to $22,666,470 in 1891"). Unlike *Norfolk & Western Railway*, *see* 390 U.S. at 326-28, this is not a case in

which the taxpayer, Polar Tankers, has presented compelling evidence that the results of the formula are grossly distorted, while the City lacks evidence supporting its assessment. On the contrary, it is Valdez that has presented substantial evidence supporting its tax and Polar Tankers that has failed to proffer evidence of gross distortion.

C. Before This Court, Polar Tankers Has Significantly Expanded The Scope Of Its Challenge

In broadening its constitutional challenge in this Court, Polar Tankers proffers arguments not fully developed, briefed, or addressed by the court below, thereby depriving this Court of the Alaska Supreme Court's full consideration of those contentions. Polar Tankers did not emphasize, as it does so prominently here, its assertion that a port-days formula unconstitutionally taxes "extraterritorial value." Pet. Br. 30-40. Rather, Polar Tankers' primary argument was that Valdez's tax "impinges on the domicile's taxing authority, creating the risk of multiple taxation." Pet. App. 11a; *see also id.* at 12a n.25 (addressing "Polar's claim of home port superiority"). If accepted by this Court, Polar Tankers' sweeping propositions about taxation and extraterritorial value could have significant repercussions for many states' tax regimes. *See MeadWestvaco*, 128 S. Ct. at 1508-09 (declining to address an issue "neither raised nor passed upon in the state courts," particularly where the issue threatened two states' taxes and "neither was on notice that the constitutionality of its tax scheme was at issue").

II. VALDEZ'S AD VALOREM PROPERTY TAX IS NOT A DUTY OF TONNAGE

A. The Tonnage Clause Is Narrow In Scope And Does Not Preclude Property Taxes On Vessels

The Framers of the Constitution sought to "alleviate . . . concerns" about interstate discord arising under the Articles of Confederation and to preserve "harmony among the States" by prohibiting "seaboard States, with their crucial ports of entry, . . . from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically." *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976). While the Import-Export Clause protects goods themselves from improper taxation by "seaboard States," the Tonnage Clause protects vessels against improper taxation by ensuring that a tax or fee imposed on a ship has some rational basis apart from the mere privilege of using the taxing jurisdiction's ports.

This Court's longstanding Tonnage Clause jurisprudence distinguishes among the types of taxes that may and may not be imposed on vessels. The Clause prohibits duties imposed on ships merely as instruments of commerce. *See, e.g., Huse v. Glover*, 119 U.S. 543, 549-50 (1886) ("A duty of tonnage within the meaning of the constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the states from imposing hindrances of this kind to commerce carried on by vessels."); *see also Clyde Mallory Lines v. Alabama*, 296 U.S. 261, 265 (1935); *State Tonnage Tax Cases*,

79 U.S. (12 Wall.) 204, 213 (1870). By contrast, taxes or fees imposed on ships are *not* duties of tonnage when those tax revenues are rationally based on "services rendered to and enjoyed by the vessel," such as pilotage, wharfage, or "charges for the use of locks on a navigable river." *Clyde Mallory*, 296 U.S. at 265-66 (citing cases).[11] Likewise, a tax based on a ship's value is not a duty of tonnage. *See, e.g.*, *Transportation Co. v. Wheeling*, 99 U.S. 273, 279 (1878) ("[I]t is too well settled to admit of question that taxes levied by a State, upon ships or vessels owned by the citizens of the State, as property, based on a valuation of the same as property, to the extent of such ownership, are not within the prohibition of the Constitution.").

Ad valorem property taxes are not duties of tonnage precisely because the tax is based on the prop-

---

[11] Consistent with the types of charges discussed in *Clyde Mallory*, some taxing authorities impose a per voyage excise tax on passengers aboard commercial passenger vessels. *See, e.g.*, Alaska Stat. § 43.52.210; CBJ Code § 69.20.020 (Juneau); *see also* 26 U.S.C. § 4471 (federal per-passenger excise tax imposed on "person providing the covered voyage"). Not even the Cruise Lines International Association, which filed a brief in support of Polar Tankers, has challenged such taxes as duties of tonnage. And rightly so, for such taxes typically provide a rough approximation of the per-passenger costs for state and local communities to host these commercial passengers, and jurisdictions typically use the funds to provide services and facilities to those passengers. *See, e.g.*, Alaska Stat. § 43.52.230 (requiring funds to be used "to provide services and infrastructure directly related to passenger vessel or watercraft visits," "to improve port and harbor facilities and other services to properly provide for vessel or watercraft visits[,] and to enhance the safety and efficiency of interstate and foreign commerce"); CBJ Code § 69.20.120(a) (Juneau) ("[t]he proceeds of the fund shall be appropriated to address the impacts caused by the marine passenger ship industry").

erty's value, not the privilege of using the taxing jurisdiction's port to engage in commerce. *See State Tonnage Tax Cases*, 79 U.S. at 213 ("Taxes levied by a State upon ships and vessels owned by the citizens of the State *as property, based on a valuation of the same* as property, are not within the prohibition of the Constitution."). Thus, in the *State Tonnage Tax Cases*, this Court struck down an Alabama tax levied on steamboats "wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents." *Id.* at 217. The Court made clear that the tax would have been permissible if it *had* been based on their value as property. *See id.* at 220; *see also Wheeling*, 99 U.S. at 279 ("[T]here are many cases in which the courts, in refuting the authority of the States to lay duties of tonnage, have admitted that the owners of ships may be taxed to the extent of their interest in the same, for the value of the property.").[12]

The Valdez tax that Polar Tankers challenges here, therefore, is an ad valorem property tax. Valdez assesses all taxable property, including vessels, at its "true and full value." Valdez Mun. Code § 3.12.070(A). Valdez's tax code further mandates that "all assessments . . . be uniform and equal and based upon the actual value of the property assessed." *Id.* Polar Tankers does not contest the accuracy of Valdez's assessment of Polar Tankers' vessels. Because Valdez's tax on the vessels is "based on a valuation of

---

[12] Because a property tax must be based on the value of the property to be outside the scope of the Tonnage Clause, as an ad valorem property tax is, Polar Tankers' claim (at 17) that a taxing jurisdiction could impose a duty of tonnage "simply by tweaking the label applied to the charge" and calling it a "property tax" is contrived.

the same as property," it is not a duty of tonnage. *Wheeling*, 99 U.S. at 279.

Moreover, Valdez imposes its tax only on those vessels that have "a tax situs within the city," not merely on those that enter Port Valdez. Pet. App. 45a. Under the Due Process Clause, a vessel obtains a tax situs only after having "regular contact" or "'habitual employment of the property within the state.'" *Braniff*, 347 U.S. at 601 (quoting *Johnson Oil Ref. Co. v. Okalahoma ex rel. Mitchell*, 290 U.S. 158, 162 (1933)). Thus, Valdez's tax is *not* a "charge upon a vessel . . . for entering or leaving" Port Valdez, or for "navigating the public waters" of Valdez, *Huse*, 119 U.S. at 549-50, for a vessel may come and go in Port Valdez free from the tax until the ship establishes sufficient contacts to acquire a situs there, *see Quill*, 504 U.S. at 306 ("[t]he Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax'") (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45 (1954)).

B. Polar Tankers Misapprehends What Constitutes A Duty Of Tonnage

Polar Tankers erroneously contends that an ad valorem property tax must be "nondiscriminatory" to fall outside the scope of the Tonnage Clause and further claims that Valdez's tax is discriminatory because it "falls almost exclusively on oil tankers." Pet. Br. 3, 17. First, this Court has never suggested, much less held, that the Tonnage Clause includes a nondiscrimination principle. Second, Valdez's property tax does not fall only on oil tankers.

1. Polar Tankers cites no case in which this Court has struck down under the Tonnage Clause an ad valorem property tax on the ground that it

discriminated among types of property. Nor would such a rule be consistent with the Tonnage Clause. So long as a tax is based on the value of property, it makes no difference what *kind* of property is subject to the tax — the tax is *not* a levy "upon the privilege of access . . . to the ports" of the taxing jurisdiction, *Clyde Mallory*, 296 U.S. at 265, and it does not become such a levy simply because it applies only to vessels.

In claiming support for its contention that the Tonnage Clause prohibits a property tax that "discriminates" based on the type of property subject to the tax, Polar Tankers misconstrues inapposite dicta from this Court's cases. In *Wheeling*, for example, this Court upheld a tax imposed on property, including steamboats. Because the tax applied to different types of property, this Court did not have reason or opportunity to opine about the constitutionality of a property tax imposed only on ships. In any event, although the Court referred to taxing ships "in the same manner" as other property, 99 U.S. at 284, its reference to the "manner" of permissible taxation under the Tonnage Clause meant taxation based on *value*, *see id.* at 279 (permitting taxation of a ship "as property, based on a valuation of the same as property"); *see also id.* at 282 ("upon a valuation"), 284 (same).[13]

Polar Tankers also misapprehends *Michelin Tire*, an Import-Export Clause case on which Polar Tank-

---

[13] Polar Tankers also relies on a single sentence in *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), in which this Court concluded that a state "may tax a ship or other vessel used in commerce the same as other property owned by its citizens." *Id.* at 402. In context, the most natural reading of that sentence is that a state may tax a vessel "[just as it may tax] other property owned by its citizens." *Id.*

ers relies heavily (at 19-21). Although the Court refers throughout that decision to "nondiscriminatory ad valorem property taxes," the Court explained what kind of discrimination it had in mind: discrimination between "imported goods" and "domestic goods," 423 U.S. at 288 & n.7, not, as Polar Tankers contends, discrimination between vessels and other types of property. *See also id.* at 289-90 ("An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to *single out goods destined for other States.*") (emphasis added).[14]

This Court has never read into the Tonnage Clause a nondiscrimination principle and has never struck down an ad valorem property tax as unduly discriminatory. The Court's references to "nondiscriminatory ad valorem property taxes" and taxing vessels "in the same manner as other property" simply reinforce what the Tonnage Clause accomplishes directly — a prohibition on taxes that take advantage of the taxing state's coastal position to the detriment of non-coastal states, by imposing a duty on vessels with cargo bound for inland states. An ad valorem property tax, even if imposed only on vessels, does not fall within that category.

2. In all events, Valdez's property tax is nondiscriminatory. The City's tax treats property the same, regardless of where it is from, where it is

---

[14] Likewise, when this Court referred to "the prohibition on discrimination" in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 761 (1978), it made clear that it was referring to discrimination "against interstate commerce," *id.* at 750, not discrimination among types of property.

destined, and where the goods are bought, sold, or used. Moreover, the City's property tax does not fall only on oil tankers. *See* Resp. Br. 23-25. As the Alaska Supreme Court properly found, *see* Pet. App. 20a, Valdez taxes such vessels in the same manner as other property, *see id.* at 47a ("[R]eal property subject to taxation includes, among other things, trailers and mobile homes, and lean-to and similar structures attached or contiguous thereto.").

CONCLUSION

The judgment of the Supreme Court of Alaska should be affirmed.

Respectfully submitted,

RICHARD SVOBODNY
Acting Attorney General
CRAIG J. TILLERY
JOANNE M. GRACE
STATE OF ALASKA
DEPARTMENT OF LAW
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-2133

TROY KING
Alabama Attorney General
500 Dexter Avenue
Montgomery, Alabama 36130

DUSTIN MCDANIEL
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201

JOHN W. SUTHERS
Attorney General of Colorado
1525 Sherman Street
Denver, Colorado 80203

DAVID C. FREDERICK
Counsel of Record
SCOTT H. ANGSTREICH
DANIEL G. BIRD
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

Counsel for Amici Curiae

RICHARD S. GEBELEIN
Chief Deputy Attorney General
for the State of Delaware
Carvel State Office Building
820 North French Street
Wilmington, Delaware 19801

BILL MCCOLLUM
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, Florida 32399-1050

LAWRENCE G. WASDEN
Idaho Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010

DOUGLAS F. GANSLER
Attorney General of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

MARTHA COAKLEY
Massachusetts Attorney
General
One Ashburton Place
Boston, Massachusetts 02108

STEVE BULLOCK
Attorney General of Montana
P.O. Box 201401
Helena, Montana 59620-1401

ANNE MILGRAM
Attorney General
State of New Jersey
Hughes Justice Complex
P.O. Box 080
25 Market Street
Trenton, New Jersey 08625

ROY COOPER
Attorney General of
North Carolina
Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602

RICHARD CORDRAY
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah 84114-2320

ROBERT M. MCKENNA
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504-0100

DARRELL V. MCGRAW, JR.
West Virginia Attorney General
Office of the Attorney General
State Capitol, Room 26-E
Charleston, West Virginia 25305

BRUCE A. SALZBURG
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

March 4, 2009

AMICUS CURIAE BRIEF

118 (1)

No. 08-310

Supreme Court, U.S.
FILED
FEB 2 - 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

♦

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

♦

On Writ Of Certiorari To The Supreme Court Of Alaska

♦

BRIEF OF TROPICAL SHIPPING AND CONSTRUCTION COMPANY LIMITED AS AMICUS CURIAE IN SUPPORT OF PETITIONER

♦

JONATHAN F. MITCHELL
Counsel of Record
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8848

PAUL C. GRACEY, JR.
NICOR INC./TROPICAL SHIPPING AND CONSTRUCTION CO. LTD.
1844 Ferry Road
Naperville, IL 60563
(630) 388-2750

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BOTA 4B4YUV

120 A 33

QUESTIONS PRESENTED

1. Whether a municipal personal property tax that falls exclusively on large vessels using the municipality's harbor violates the Tonnage Clause of the Constitution, Art. I, § 10, Cl. 3.

2. Whether a municipal personal property tax that is apportioned to reach the value of property with an out-of-state domicile for periods when the property is on the high seas or otherwise outside the taxing jurisdiction of any State violates the Commerce and Due Process Clauses of the Constitution.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. States cannot escape the Duty of Tonnage Clause by simply recalibrating such duties as a function of the vessel's assessed market value 7

A. States may impose charges for services that they provide to vessels, but they may not charge vessels for the mere privilege of using their ports 13

B. States may levy generally applicable personal property taxes on vessels in their ports, but the Duty of Tonnage Clause forbids assessments targeted at vessels as instrumentalities of commerce or navigation 16

II. The City of Valdez "personal property" tax is a duty of tonnage masquerading as a property tax 21

A. The City of Valdez has violated the Tonnage Clause by targeting its personal property tax at ships and vessels in its ports and exempting all other personal property from its scope 22

TABLE OF CONTENTS – Continued

Page

B. The City of Valdez has violated the Tonnage Clause by adopting an apportionment formula that bears no relation to the benefits and municipal services it provides to vessel owners 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. *New Jersey*, 530 U.S. 466 (2000).....6, 7, 12

Camps Newfound/Owatonna, Inc. v. *Town of Harrison*, 520 U.S. 564 (1997).....8

Cannon v. *New Orleans*, 87 U.S. (20 Wall.) 577 (1874).....11, 14

Clyde Mallory Lines v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935).....*passim*

Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824).....8

Hays v. *Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1855).....18

Huse v. *Glover*, 119 U.S. 543 (1886).....16

Inman S.S. Co. v. *Tinker*, 94 U.S. 238 (1876).....13, 15

Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979).....18

Norris v. *City of Boston*, 48 U.S. (7 How.) 283 (1849).....9

Packet Co. v. *Keokuk*, 95 U.S. 80 (1877).....15

Ring v. *Arizona*, 536 U.S. 584 (2002).....20

State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204 (1870).....*passim*

Steamship Co. v. *Portwardens*, 73 U.S. (6 Wall.) 31 (1867).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Transp. Co. v. *Parkersburg*, 107 U.S. 691 (1883).....15

Transp. Co. v. *Wheeling*, 99 U.S. 273 (1878).....16, 17, 18, 21, 23

Walz v. *Tax Comm'n of the City of New York*, 397 U.S. 664 (1970).....24

Woodruff v. *Parham*, 75 U.S. (8 Wall.) 123 (1869).....8

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10, Cl. 2.....8

U.S. Const. Art. I, § 10, Cl. 3.....3, 4, 5, 7

MISCELLANEOUS

William Henry Burroughs, *A Treatise on the Law of Taxation* (1877).....8

INTEREST OF AMICUS

Amicus curiae Tropical Shipping and Construction Company Limited is a shipping company whose vessels use United States ports. *Amicus curiae* has an interest in ensuring that state and municipal shipping taxes remain within the boundaries prescribed in the Duty of Tonnage Clause and in this Court's jurisprudence.[1]

♦

STATEMENT OF THE CASE

In 1999, the City of Valdez enacted Ordinance No. 99-17, which imposes a "personal property" tax on certain vessels over 95 feet in length. Pet. App. 45a. The Ordinance, however, exempts commercial-fishing vessels and "all other personal property" from this exaction. *Id.* at 45a, 48a. It also exempts vessels that dock exclusively at the Valdez Container Terminal, a city-owned dock that has no crude oil storage facilities and is not used for transporting crude oil. *Id.* at 45a. As a result, Valdez's personal property tax falls

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

primarily on oil tankers that transport Alaska's crude oil exports to out-of-state residents. *Id.* at 40a.[2]

In addition, most of these vessels are domiciled in other States and, as mobile property, spend much of the year on the high seas or in ports outside of Valdez. Yet Valdez fails to apportion its property tax in accordance with the amount of time that the vessels spend in the city's ports. Instead, Valdez employs a "port-day" formula, which divides the number of days a vessel spends in Valdez by the number of days spent in all ports in a given year. The City then multiplies this fraction with the total assessed value of the vessel, and levies a 20 mill (2%) tax on that amount. Pet. App. 55a-56a. Under this formula, a vessel that spends 4 days in Valdez ports, 2 days in another jurisdiction's port, and 359 days on the high seas will pay a *higher* tax rate than a vessel that spends 100 days in Valdez, 200 days in other ports, and 65 days on the high seas. This "port-day" formula upends any connection between the amount of the assessed tax and the public services, such as police and fire protection, that the City provides to the vessel's owners.

The state trial court initially held that this vessel tax violated the Duty of Tonnage Clause, which provides that "No State shall, without the Consent of

[2] The state trial court noted that in 2000, the City of Valdez assessed its personal property tax on 28 vessels; 24 of these were oil tankers. See Pet. App. 40a n.2. Valdez also collected tax that year from three tugboats and one passenger cruise ship. J.A. 53.

Congress, lay any Duty of Tonnage . . . " U.S. Const. Art. I, § 10, Cl. 3. Even though the City had never linked the *amount* of tax owed with the vessels' "tonnage" (*i.e.*, weight or carrying capacity), the trial court relied on this Court's decision in *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261, 265 (1935), which declared that a "Duty of Tonnage" includes *any* tax or duty "for the privilege of entering, trading in or lying in a port" – "regardless of [its] name or form, *and even though not measured by the tonnage of the vessel.*" *Id.* at 265-266 (emphasis added). By contrast, the Tonnage Clause *permits* States to assess charges "for services rendered to and enjoyed by the vessel, such as pilotage, or wharfage." *Id.* at 266 (citations omitted).[3] Applying this framework, the court found that the vessel tax violated the Tonnage Clause because the City was not attempting to collect compensation for specific services that it provided to the vessels' owners. Pet. App. 42a-43a. Rather, the vessel tax was a means to raise general revenues that the City wanted to replenish its declining tax base and fund projects such as school and hospital construction;[4] in other words, it was a tax

[3] See also *id.* at 265 (stating that Tonnage Clause allows "fees or charges by authority of a state for services facilitating commerce, such as pilotage, towage, charges for loading and unloading cargoes, wharfage, storage, and the like").

[4] See, *e.g.*, Pet. App. at 53a-54a (quoting City of Valdez Resolution No. 00-15, which bemoans the city's declining tax revenues and mentions the need to build a new hospital and a new junior high school).

imposed for the mere privilege of using the City's ports.

Two days later, however, the trial court changed its mind and decided that the Vessel Tax was not a "Duty of Tonnage" under Article I, § 10, Cl. 3. It noted that the City of Valdez provided the vessels with "various benefits or municipal services" that were funded by general tax revenues. Pet. App. 29a. And that, in the trial court's view, was enough to uphold the vessel tax as a "charge for services rendered to and enjoyed by the vessel," rather than an unconstitutional "Duty of Tonnage." The court admitted that it had "misunderstood the taxpayers to be arguing that *no* public services of the City which are paid for by the tax were available to the vessels." Pet. App. 29a (emphasis added). The trial court was also untroubled by its earlier observation that the City had "targeted" this personal property tax exclusively on vessels in the City's ports. The court explained: "The failure of the City to tax more property does not make its taxation of all property of this class an unconstitutional tonnage tax." Pet. App. 30a. The trial court did, however, conclude that the vessel tax violated the Due Process and Commerce Clauses. *Id.* at 23a.

On appeal, the Alaska Supreme Court also rejected the Petitioner's contention that the vessel tax violated the Tonnage Clause. The state supreme court held that a "fairly apportioned property tax" is not a forbidden "Duty of Tonnage" under Article I, § 10, Cl. 3. To support this claim, the court cited *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1870),

where this Court held that the Tonnage Clause forbids States from taxing vessels "as instruments of commerce and navigation" while stating in *dictum* that the Tonnage Clause allows States to tax vessels "*as property, based on a valuation of the same* as property." *Id.* at 213 (emphasis in original). Like the trial court, the state supreme court saw no problems with the City's decision to limit its "personal property" tax to vessels, and brushed aside the Petitioner's contention that this blatant discrimination converted the property tax into a charge for "the privilege of entering, trading in, or lying in" Valdez's ports. In the state supreme court's view, "the legitimacy of the vessel tax does not depend on whether the city chooses to tax other personal property." Pet. App. 20a.

♦

SUMMARY OF ARGUMENT

The Alaska Supreme Court erred by concluding that the vessel tax was a "fairly apportioned property tax" rather than a thinly disguised charge for the privilege of using Valdez's ports. This Court has long held that the States cannot escape the restrictions in Article I, § 10, Cl. 3 by converting Duties of Tonnage into assessments based on measures other than a vessel's weight or carrying capacity. *Any* requirement that vessels pay tribute for the privilege of using a State's port is still a "duty" on that vessel's "tonnage," even if individual ships pay different *effective tax rates* on their tonnage. That is exactly the regime

that Valdez has established in this case. Its so-called "personal property" tax applies only to vessels that use the Valdez ports, and exempts "all other personal property" from its reach. And the City's port-day apportionment formula destroys any possible relationship between the amount of tax charged to each vessel and the benefits or municipal services, such as police and fire protection, that Valdez provides to valuable property within in its jurisdiction. This is nothing more than an unconstitutional "Duty of Tonnage" masquerading as a property tax.

The Tonnage Clause does allow States to collect a *genuine* personal property tax from ships and vessels in its ports. But such taxes must also apply to other items of personal property in the taxing jurisdiction, and cannot single out vessels that use the State's ports. That is the only way to distinguish a true "personal property" tax from a repackaged "duty of tonnage" that seeks only to extract money from vessels for the privilege of using a State's ports. To hold otherwise would render the Tonnage Clause a dead letter, as States and localities could siphon as much as they can from vessels in their ports without having to tax any other personal property in their jurisdiction. The only constitutional constraint would be that States call this assessment a "property tax" rather than a duty on the vessel.

When States can attempt to evade constitutional constraints through clever legislative draftsmanship, this Court disregards the State's nomenclature and looks solely to the State law's *effects*. In *Apprendi* v.

New Jersey, 530 U.S. 466 (2000), for example, this Court refused to allow States to circumvent the constitutional jury right by recharacterizing the elements of crimes as "sentencing factors." Instead, this Court protected the jury right by establishing a bright-line rule, extending the jury right to any fact that had the effect of increasing a defendant's maximum allowable punishment. *Id.* at 494 n.19. So too, here, this Court must disregard the City of Valdez's decision to label this assessment a "personal property tax," and determine whether the effect of the tax is to charge tribute from vessels for the mere privilege of using the City's ports. This Court need not resolve, in this case, the precise extent to which seaboard jurisdictions may establish exemptions to generally applicable property taxes without crossing constitutional boundaries. But there can be no doubt that the Valdez "personal property tax" in this case, which exempts *all* personal property *except* ships and vessels in the City's ports, falls on the "Duty of Tonnage" side of the line.

♦

ARGUMENT

I. States Cannot Escape The Duty Of Tonnage Clause By Simply Recalibrating Such Duties As A Function Of The Vessel's Assessed Market Value.

The Tonnage Clause provides that "[n]o State shall, without the Consent of Congress, lay any Duty of Tonnage." U.S. Const. Art. I, § 10, Cl. 3. The

Constitution also prohibits the States from "lay[ing] any Imposts or Duties on Imports or Exports" without congressional consent, unless "absolutely necessary" for executing state inspection laws. U.S. Const. Art. I, § 10, Cl. 2. The Framers added the Tonnage Clause to buttress the Import-Export Clause; without the Tonnage Clause, States could indirectly tax imports and exports by taxing the carrying capacity of the vessels used to transport them.[5] The Tonnage Clause serves this important function regardless of whether the Import-Export Clause applies only to foreign commerce, as this Court held in *Woodruff* v. *Parham*, 75 U.S. (8 Wall.) 123 (1869), or whether the Import-Export Clause extends also to interstate commerce, as three Justices concluded in *Camps Newfound/Owatonna,*

[5] See, *e.g.*, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935) ("If the states had been left free to tax the privilege of access by vessels to their harbors the prohibition against duties on imports and exports could have been nullified by taxing the vessels transporting the merchandise"); *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 218 (1870) ("[T]he prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition on any duty of tonnage"); *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 202 (1824) ("'A duty of tonnage' is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also"); William Henry Burroughs, *A Treatise on the Law of Taxation* 91 (1877) ("[T]he reason which induced the Framers of the Constitution to withdraw imports and exports from taxation, apply as strongly to the vessels engaged in carrying the goods").

Inc. v. *Town of Harrison*, 520 U.S. 564, 609-640 (1997) (Thomas, J., dissenting).

Just as the Tonnage Clause precludes States from evading the Import-Export Clause by taxing a vessel's tonnage, this Court's jurisprudence prohibits States from disguising "duties of tonnage" in the form of other assessments with the same functional effects. As Justice Grier explained in *Norris* v. *City of Boston*, 48 U.S. (7 How.) 283 (1849):

> It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, the size and power of the steam-engine, or the number of passengers which she carries.

Id. at 458-459 (opinion of Grier, J.).

This Court has consistently followed Justice Grier's approach, refusing to limit the Tonnage Clause to assessments on a ship's weight or carrying capacity. Instead, this Court has held that the Tonnage Clause prohibits other assessments on vessels that differ in nomenclature and form, yet have the same effect of extracting money from ship owners for the mere privilege of entering a State's ports. In *Steamship Co.* v. *Portwardens*, 73 U.S. (6 Wall.) 31

(1867), for example, this Court invalidated a flat 5 dollar assessment that Louisiana imposed on every vessel, regardless of weight or cargo capacity, that arrived in the port of New Orleans. *Id.* at 35. In defending this tax, the State argued that the Tonnage Clause applies only to duties "proportioned to the tonnage of the vessel; that is to say a certain rate or so much per ton." *Id.* at 32. But this Court emphatically rejected that contention and held that the Tonnage Clause prohibits "*any duty on the ship*, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty." *Id.* at 35 (emphasis added).

In the *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204 (1870), this Court again rejected the notion that the Tonnage Clause extends only to assessments on a ship's weight or carrying capacity. It proclaimed that the Tonnage Clause prohibits all "taxes levied by a State upon ships and vessels *as instruments of commerce and navigation*." *Id.* at 213 (emphasis added). See also *id.* at 218 (emphasizing that the Tonnage Clause prohibits "*any duty* on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty") (emphasis in original); *id.* at 214 ("[I]f the States, without the consent of Congress, tax ships or vessels as instruments on commerce, by a tonnage duty, *or indirectly by imposing the tax upon the master or crew*, they assume a jurisdiction which they do not possess, as every such

act falls directly within the prohibition of the Constitution") (emphasis added).

Finally, in *Cannon* v. *New Orleans*, 87 U.S. (20 Wall.) 577 (1874), this Court considered an ordinance that imposed "levee dues" on steamboats that land or moor in the port of New Orleans. For steamboats in port five days or fewer, these "levee dues" were 10 cents per ton; after the vessel's first five days in port, the dues were 5 dollars per day; and steamboats that arrived and departed more than once per week paid only 7 cents per ton on each trip. *Id.* at 578. So the State apportioned some of this tax according to a vessel's tonnage, and apportioned some of it by the number of days in port. But this Court invalidated *all* of it. Quoting extensively from *Steamship Co.*, this Court reiterated that the Tonnage Clause extends beyond "dut[ies] proportioned to the tonnage of the vessel," and reaches any "contribution claimed for the privilege of arriving and departing from a port of the United States," *id.* at 581. This is so regardless of whether the taxing authority charges by the ton, by the number of days in port, or by some other criterion.

These holdings were not only necessary to prevent the States from evading the Tonnage Clause by recalibrating their duties to some other characteristic of the vessel, they are also the most natural reading of the constitutional text. The Framers did not limit the Tonnage Clause prohibition to "duties *proportionate to a vessel's* tonnage"; they extended it to any "Duty *of* Tonnage." Their choice to use these more

general terms refutes the notion that the clause prohibits only duties that take the form of a fixed charge per ton, or that the drafters intended to establish such an easy roadmap for State evasion. Rather, the clause reflects the recognition that *any* tribute assessed on vessels for the mere privilege of using a State's ports is still a "duty" on that vessel's "tonnage," even if it takes the form of a flat fee, a *per diem* charge, or a tax proportioned to a vessel's market value. The only difference is that some vessels in the port may pay a different *effective tax rate* on their tonnage than others. But it does not make the tax any less of a "duty" on the "tonnage" in that vessel.

Indeed, no one could seriously maintain, on either textual or practical grounds, that a State can escape the Tonnage Clause by imposing a duty on a vessel's masts, or on its passengers, or even on its fair market value, for the mere privilege of using the State's ports. Such efforts can be no more availing than legislatures' attempts to evade other constitutional protections by tweaking the form of their laws. For example, this Court has rejected the notion that States can circumvent the jury right by recharacterizing "elements" of crimes as "sentencing enhancements." See, *e.g.*, *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). For *both* the Tonnage Clause and the jury right, the constitutional inquiry depends not on matters of form or nomenclature, but on the law's effects. See *Apprendi*, 530 U.S. at 494 ("[T]he relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater

punishment than that authorized by the jury's guilty verdict?"); *Clyde Mallory Lines*, 296 U.S. at 264-265 ("[T]he prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port").

This is not to say that the Tonnage Clause forbids States from imposing *any* tax or charge on the vessels that use its ports. Sometimes a tax on vessels may serve as a legitimate compensatory assessment for services that the State provided, or as a generally applicable property tax, rather than an unconstitutional "duty" on the vessel's "tonnage." But it does require courts to scrutinize the *effects* of these laws, and to invalidate any state or municipal tax that operates to charge vessels for the mere privilege of using a port, without regard to the name or title that the State affixes to the tax. See *Inman S.S. Co.* v. *Tinker*, 94 U.S. 238, 244 (1876) ("[T]he name is immaterial: it is the substance we are to consider").

A. States May Impose Charges For Services That They Provide To Vessels, But They May Not Charge Vessels For The Mere Privilege Of Using Their Ports.

Whenever this Court has invalidated a tax under the Tonnage Clause, it has been careful to note that

States and localities *may* assess ship owners for the services that these jurisdictions provide to vessels in their ports. In *Steamship Co.*, for example, this Court suggested that the Tonnage Clause would allow States to charge vessels for services provided by portwardens. 73 U.S. (6 Wall.) at 33. But this Court rejected Louisiana's effort to characterize its $5 assessment as compensation for portwardens' services, because state law required this payment to the master and wardens "whether they be called on to perform any service or not." *Id.* at 34.

And in the *State Tonnage Tax Cases*, this Court emphasized that States could tax vessels if such assessments "aid . . . the inspection laws of a State" or "contemplat[e] benefits and advantages to commerce and navigation." 79 U.S. (12 Wall.) at 219. But the tax in that case was "emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation." *Id.* at 220.

Likewise in *Cannon*, this Court asserted that States may require vessels landing at publicly-owned wharfs or piers to pay a "just compensation for the use of such property." 87 U.S. (20 Wall.) at 582. But the New Orleans levee dues could not be regarded as "just compensation" for using the city's wharves, because they were imposed on all steamboats landing in the city limits, regardless of whether the boats used the city's wharves. *Id.* at 580. See also *id.* at 581 ("[T]he dues here claimed cannot be supported as a

compensation for the use of the city's wharves, but that it is a tax upon every vessel which stops, either by landing or mooring, in the waters of the Mississippi River within the city of New Orleans, for the privilege of so landing or mooring"). See also *Inman S.S. Co.*, 94 U.S. 238, 243 (1876) (condemning a New York tax as an unconstitutional tonnage duty only after concluding that the tax "is not exacted for any services rendered or offered to be rendered").

Indeed, this Court has even upheld direct assessments *on a vessel's tonnage* when they represent reasonable compensation for services provided to vessels. *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877), upheld a wharfage fee on vessels that land and moor at the city's wharves, even though fees were proportioned to the vessels' tonnage. This Court wrote that "a charge for services rendered or for conveniences provided is in no sense a tax or a duty." *Id.* at 84. It viewed wharfage fees as akin to acts of proprietorship rather than acts of sovereignty, and concluded that they therefore fell outside the prohibition on "*duties* of tonnage." *Id.* at 85. Yet this Court cautioned that such assessments *would* qualify as "a duty" or "a tax" if they were imposed "for the privilege of entering the port Keokuk, or remaining in it, or departing from it." *Id.* at 84. See also *Clyde Mallory Lines*, 296 U.S. at 266 (holding that the Duty of Tonnage Clause "does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel"); *Transp. Co.* v. *Parkersburg*, 107 U.S. 691, 696 (1883) ("[A] duty of

tonnage is a charge for the privilege of entering, or trading or lying in, a port or harbor; wharfage is a charge for the use of a wharf"); *Huse* v. *Glover*, 119 U.S. 543, 550 (1886). Again, the constitutionality depends on the *functional effects* of the assessment, without regard to whether a particular vessel's tax bill is a function of its tonnage or some other characteristic. It must be reasonably related to services that the taxing jurisdiction provided to ship owners, rather than a charge imposed on vessels for the mere privilege of using the jurisdiction's ports.

B. States May Levy Generally Applicable Personal Property Taxes On Vessels In Their Ports, But The Duty of Tonnage Clause Forbids Assessments Targeted At Vessels As Instrumentalities Of Commerce Or Navigation.

This Court has also allowed States and municipalities to apply generally applicable personal property taxes to vessels owned by their citizens. In *Transp. Co.* v. *Wheeling*, 99 U.S. 273 (1878), this Court rejected a Tonnage Clause challenge to a tax that West Virginia imposed on its citizens' personal property. The tax applied to any personal property registered in the assessors' books,[6] and established a

[6] This Court's opinion in *Wheeling* does not indicate the scope of this category of taxable personal property, but it does note that the personal property tax extended to some of the

(Continued on following page)

uniform annual rate on that property. *Id.* at 277. This Court turned aside the plaintiff-in-error's claim that the property tax violated the Tonnage Clause when applied to vessels; the Court thought it "well settled" that States could tax their citizens' vessels as personal property without violating the Tonnage Clause. *Id.* at 279.

But *Wheeling* holds only that the Tonnage Clause permits a State to impose property taxes that are: (1) Generally applicable to personal property, and (2) Apply only to its citizens' personal property. *Wheeling* never suggested, in holding or *dictum*, that a State could adopt a "personal property" tax levied *exclusively* on ships and vessels entering its ports. Such a view would have been irreconcilable with this Court's holdings in *Steamship Co.*, the *State Tonnage Tax Cases*, and *Cannon*, which forbid *any* assessments imposed on vessels for the mere privilege of using a State's ports. And it would have opened the door for States to shield unconstitutional tonnage duties from constitutional scrutiny by relabeling them as "personal property" taxes that apply only to ships and vessels. Indeed, the *Wheeling* Court anticipated this very possibility, and, citing Burroughs's treatise on taxation, stated that the Tonnage Clause prohibition "*comes into play where [vessels] are not taxed in the same manner as the other property of the citizens*, or

plaintiff's furniture, as well as to its ships and vessels. See 99 U.S. at 278.

where the tax is imposed upon the vessel as an instrument of commerce, without reference to the value as property." *Id.* at 284 (emphasis added).

Nor did *Wheeling* allow States to tax *non-citizens'* vessels that use the State's ports. The "home-port doctrine" still prevailed at the time of *Wheeling*, which allowed only the domiciliary State to tax movable property. See, *e.g.*, *Hays* v. *Pac. Mail S.S. Co.*, 58 U.S. (17 How.) 596 (1855). Although the home-port doctrine is now defunct, and no longer presents a barrier to States' efforts to tax non-citizens' property, see, *e.g.*, *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434 (1979), the *Wheeling* opinion *still* forecloses assessments targeted at vessels as instruments of commerce, rather than to obtain compensation for services, such as police and fire protection, that the State has provided to owners of valuable property within its jurisdiction. See *Wheeling*, 99 U.S. at 283 (emphasizing that vessels may be taxed "only as property and not as vehicles of commerce"); *id.* at 284 ("Decided cases of the kind everywhere deny to the States the power to tax ships as the instruments of commerce").

The *State Tonnage Tax Cases* endorsed this same distinction between a genuine property tax, applicable to all types of property owned by the State's citizens, and an assessment targeted at vessels as "instruments of commerce and navigation." See 79 U.S. (12 Wall.) at 213. In these cases, Alabama had enacted a revenue law that established two tax rates on personal property throughout the State. For

"property generally," the tax was 0.5% of the property's assessed value. But for "steamboats, vessels, and other water crafts plying in the navigable waters of the State," the tax was "$1 per ton of the registered tonnage thereof." See *id.* at 204. This latter category established a dramatically higher tax rate that applied only to steamboats and vessels. As an example, one of the taxpayer's ships was valued at $5000, but could hold 321 tons. At the tax rate that Alabama established for "property generally," the tax would have been $25, but the special tax rate that Alabama imposed on steamboats and vessels left the taxpayer with a bill for $321 – a greater-than-twelvefold increase. See *id.* at 211.

This Court invalidated this vessels-only tax bracket as an unconstitutional "duty of tonnage," and rejected the State's efforts to characterize it as a "property tax." The problem was not simply that Alabama had taxed steamboats and vessels according to their tonnage rather than their assessed value. Rather, Alabama had *targeted* an enhanced tax at ships and vessels acting as instruments of commerce and navigation. Wrote the Court:

> "[T]he tax is . . . a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are 'plying in the navigable waters of the State,' showing to a demonstration that it is as instruments of commerce and not as property that they are

> required to contribute to the revenues of the state."

Id. at 217-218.

This holding establishes that so-called "property taxes" on vessels must represent *genuine* property taxes to pass muster under the Tonnage Clause, assessed on the vessel *as property* rather than as an instrument of commerce. See 79 U.S. (12 Wall.) at 213 ("Taxes levied by a State upon ships and vessels owned by the citizens of the State *as property, based on a valuation of the same* as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying *any duty of tonnage*, without the consent of Congress") (emphasis in original). A tax that applies only to ships and vessels as instruments of commerce, and that seeks revenue for the mere privilege of using a State's ports, violates the Tonnage Clause, regardless of whether a State calls it a "property tax," a "duty of tonnage," or "Mary Jane." *Cf. Ring* v. *Arizona*, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

* * *

States cannot escape the Duty of Tonnage Clause by repackaging duties as other forms of assessments on vessels for the mere privilege of using ports. And this Court has established two bright-line rules that prevent States from disguising tonnage duties in the

form of other assessments that have the same functional effects. First, States may not impose *any* taxes or duties that "operate to impose a charge for the privilege of entering, trading in, or lying in a port," although States may assess charges "for services rendered to and enjoyed by the vessel." *Clyde Mallory Lines*, 296 U.S. at 265-266. A "duty of tonnage" need not be a duty *proportioned to* the vessel's tonnage, but includes any tax on vessels *with tonnage* that requires tribute for the privilege of using a State's ports.

Second, States may not impose taxes on vessels "as instruments of commerce and navigation," *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213, although they may tax vessels pursuant to a generally applicable property tax, see *Wheeling*, 99 U.S. at 284. Without these safeguards, States would face no meaningful constraints in their efforts to exact money from vessels that use their ports, and the Tonnage Clause would become a toothless relic. Each of these rules requires courts to scrutinize the *effects* of a State's vessel tax, rather than the nomenclature that state officials use to describe it.

II. The City Of Valdez "Personal Property" Tax Is A Duty Of Tonnage Masquerading As A Property Tax.

When one scrutinizes the effects of the Valdez personal property tax rather than its nomenclature, it becomes obvious that this tax is both a "charge for the

privilege of entering, trading in, or lying in a port," *Clyde Mallory Lines*, 296 U.S. at 265-266, as well as a tax on vessels "as instruments of commerce and navigation," *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) at 213. This is evident when one considers that Valdez imposes its "personal property" tax only on ships and vessels that use its ports; all other personal property is exempt. What's more, the port-day apportionment formula indicates that Valdez is simply trying to extract money from the vessel owners, without any effort to apportion the assessment according to the amount of services that Valdez might have provided to property owners in its jurisdiction. This so-called "property tax" is a sham, and serves only to exact tribute from vessels for the mere privilege of using the City's ports.

A. The City Of Valdez Has Violated The Tonnage Clause By Targeting Its Personal Property Tax At Ships And Vessels In Its Ports And Exempting All Other Personal Property From Its Scope.

Ordinance No. 99-17 imposes a "personal property" tax on certain vessels over 95 feet in length. Pet. App. 45a. But it exempts commercial-fishing vessels and "all other personal property" from this exaction. *Id.* at 45a, 48a. The upshot is that Valdez's personal property tax falls exclusively on ships and vessels in its ports, and primarily on oil tankers that transport

Alaska's crude oil exports to out-of-state residents. *Id.* at 40a.[7]

This is almost as blatant an evasion of the Duty of Tonnage Clause as one can imagine: a supposed "personal property" tax that applies only to ships and vessels in a city's ports. The only potential saving grace is that Valdez also taxes real property, including trailers and mobile homes, under a separate provision of the City Code. See Pet. App. 47a-48a (quoting section 3.12.022 of the Valdez City Code). Valdez believes that suffices to defeat the Petitioner's contention that this "personal property" tax is a "Duty of Tonnage" in disguise. See Brief in Opposition at 11. But a State or municipality cannot insulate a vessel tax from judicial scrutiny by the simple expedient of combining it with a tax on real property, or some other small subset of property within its jurisdiction. The Tonnage Clause compels courts to scrutinize taxes on vessels to ensure that they represent a genuine and generally applicable property tax, see *Wheeling*, 99 U.S. at 284, or else a charge for "services rendered to and enjoyed by the vessel," *Clyde Mallory Lines*, 296 U.S. at 265-266, rather than a disguised effort to exact tribute from commercial vessels for the mere privilege of using its ports. Under any standard of review, even rational basis, the Valdez personal-property tax flunks this test. There is no conceivable reason to establish a property-tax

[7] See note 2, *supra*.

regime that taxes only real property *and* vessels in the City's ports except to shift the tax burden on to the out-of-state commercial interests that use Valdez's ports. This is only confirmed by the City's decision to exempt fishing vessels from the tax, which are mostly owned by local commercial interests.

None of this implies that property-tax exemptions are *per se* unconstitutional, as Valdez suggests in its caricature of Petitioner's argument. See Brief in Opposition at 12 n.3. If, for example, a taxing jurisdiction established a generally applicable property tax that exempted property owned by charitable institutions, it is easy to see that such an exemption serves purposes other than a desire to exact tribute from vessels that use that jurisdiction's ports. See, *e.g.*, *Walz* v. *Tax Comm'n of the City of New York*, 397 U.S. 664 (1970). The same would likely be true when a taxing jurisdiction exempts small subsets of real or personal property from a generally applicable property tax. But when a seaboard jurisdiction exempts all forms of personal property *except* vessels in its ports, there can be no doubt that the tax is targeting ships and vessels "as instruments of commerce and navigation" rather than as property, see *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 213 (1870), and effectively becomes a tax on the imports and exports that the vessels transport.

B. The City Of Valdez Has Violated The Tonnage Clause By Adopting An Apportionment Formula That Bears No Relation To The Benefits And Municipal Services It Provides To Vessel Owners.

Valdez has aggravated the constitutional problems with its vessels-only tax by adopting an apportionment formula that fails to reflect any rational connection between the amount of tax paid and the value of the services that Valdez has provided to the tankers' owners. This is further confirmation that Valdez is extracting money for the mere privilege of using its ports, rather than seeking to compensate itself for protecting the vessel owners' property and providing other services while the vessels are within the City's jurisdiction.

Most of the vessels subject to tax in Valdez are domiciled in other States and spend much of the year on the high seas or in ports outside of Valdez. Yet Valdez fails to apportion its property tax in accordance with the number of days that the tankers spend in the City's ports. Instead, Valdez employs a "port-day" formula, which taxes the vessel for the time it spends in Valdez as a percentage of the total time spent *in all ports* in a given year. Pet. App. 55a-56a. This formula requires a vessel that spends 4 days in a Valdez port, 2 days in another jurisdiction's port, and 359 days on the high seas to pay a *higher* annual tax rate on its assessed value than a vessel that spends 100 days in Valdez, 200 days in other

ports, and 65 days on the high seas. This "port-day formula" upends any connection between the amount of the assessed tax and the public services, such as police and fire protection, that the City provides to the vessel's owners, and defeats any attempt to characterize the assessment as a genuine property tax.

Valdez notes that it provides many services to the oil tankers in its ports, see Brief in Opposition at 1-3, and that is undeniable. But the same, of course, could be said of the States and municipalities that attempted to tax vessels in *Steamship Co.*, the *State Tonnage Tax Cases*, and *Cannon*. The inquiry under the Tonnage Clause is not whether the City of Valdez provides some benefits to the tankers (every port city provides services to vessels in its ports), but whether the tax reflects a charge for the mere privilege of using the city's ports. In this case, the amount of tax imposed bears no relation to the amount of public services that individual tankers consume, depending instead on utterly irrelevant factors such as the number of days a tanker spends on the high seas rather than in other jurisdictions' ports. In light of this "port-day formula," this tax cannot be considered a mere compensatory assessment for services that Valdez provided to the vessels, nor can it be upheld as a genuine personal property tax, as the amount of tax is untethered to the value of the public resources needed to protect the property. It can only be an unconstitutional attempt to evade the Tonnage

Clause by charging vessels for the mere privilege of using the City's ports.

♦

CONCLUSION

This Court should reverse the Alaska Supreme Court's judgment.

Respectfully submitted,

JONATHAN F. MITCHELL
3301 Fairfax Drive
Arlington, VA 22201
(703) 993-8848

PAUL C. GRACEY, JR.
NICOR INC./TROPICAL SHIPPING
AND CONSTRUCTION CO. LTD.
1844 Ferry Road
Naperville, IL 60563
(630) 388-2750

AMICUS CURIAE BRIEF

118 (9)

No. 08-310

Supreme Court, U.S.
FILED
FEB 2 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF *AMICI CURIAE* WORLD SHIPPING COUNCIL & CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONER

LAWRENCE W. KAYE
ANDRÉ M. PICCIURRO
KAYE, ROSE & PARTNERS, LLP
402 W. Broadway
Suite 1300
San Diego, CA 92101
(619) 232-6555

Counsel for Amicus Curiae Cruise Lines International Association

MARC J. FINK
Counsel of Record
JOHN W. BUTLER
SHER & BLACKWELL, LLP
1850 M Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 463-2500

Counsel for Amicus Curiae World Shipping Council

February 2, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

BOTH 4G425b

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
1. The Valdez Levy is a Prohibited Tonnage Duty	6
2. Apportionment	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES	Page
Clyde Mallory Lines v. *Alabama*, 296 U.S. 261 (1935)	7
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977)	9
Exxon Corp. v. *Wisc. Dep't of Rev.*, 447 U.S. 207 (1980)	7
Japan Line, Ltd. v. *County of Los Angeles*, 441 U.S. 434 (1979)	5, 6, 9, 10, 11
Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1975)	8
Ott v. *Mississippi Valley Barge Line, Co.*, 336 U.S. 169 (1949)	9
Passenger Cases, 7 How. 283 (1849)	7
Wheeling, P & C Transp. Co. v. *Wheeling*, 99 U.S. 273 (1878)	6

IN THE

Supreme Court of the United States

No. 08-310

POLAR TANKERS, INC.,
Petitioner,

v.

CITY OF VALDEZ, ALASKA
Respondent.

On Writ of Certiorari to the Supreme Court of Alaska

BRIEF OF *AMICI CURIAE* WORLD SHIPPING COUNCIL & CRUISE LINES INTERNATIONAL ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICI* [1]

The World Shipping Council and Cruise Lines International Association respectfully file this brief as amici curiae in support of Petitioner. Blanket consent letters are on file with the Clerk.

[1] In accordance with the Court's Rule 37.6, amici and their counsel certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than amici and their members made any monetary contribution to the preparation or submission of this brief.

The World Shipping Council ("WSC") is a U.S.–based membership trade association with 28 members that provide international liner shipping services to and from the United States and between other nations around the world. WSC's members are domiciled in 17 different countries, with agencies and offices in virtually all of the nations that they serve.

"Liner" shipping is that sector of the ocean transportation industry that operates vessels on regularly scheduled routes, as opposed to "tramp" shipping, in which vessel itineraries are dictated by the spot demands of particular customers. WSC's members provide international containerized shipping services, in which cargoes are loaded into containers that can be lifted on and off of vessels, trains, and truck chassis without the need for opening and repacking, as well as roll-on/roll-off services, in which automobiles and other wheeled vehicles are driven onto and off of vessels.

Liner carriers employ vessels operated under a number of types of arrangements. A substantial number of vessels are owned directly by the shipping lines. In addition, a sizeable number are owned by companies that are in the business of owning vessels and chartering them to others, under both short-term and long-term arrangements. Vessels may be documented in their owners' countries of domicile, or they may be flagged in other jurisdictions. In addition to providing port-to-port cargo transportation service, ocean carriers also routinely provide "through" transportation for U.S. importers and exporters from an inland point in one country to an inland point in another country. In those cases, for example, a container bound for Chicago might be unloaded at a port in California and moved inland by rail.

Taken together, WSC's members handle over ninety percent of the United States ocean-borne containerized cargo. In 2007, WSC member lines' liner shipping vessels made 25,940 port calls in the United States (71 per day), serving 57 different U.S. ports (including Alaskan ports, but not Valdez), and transporting goods to and from 175 foreign countries. In that year, they carried approximately 17 million loaded containers of American import and export cargo.

The Cruise Lines International Association ("CLIA"), based in Fort Lauderdale, Florida with a satellite office in Washington, D.C., is the world's largest cruise line non-profit trade association. CLIA's 23 cruise line members represent 97 percent of the cruise capacity operating in North America. CLIA's Executive Partners include over 80 strategic business allies, providing a wide array of services to the cruise industry. In addition, CLIA has nearly 16,000 travel agent professionals as members. CLIA operates pursuant to an agreement filed with the Federal Maritime Commission under the Shipping Act of 1984 and serves as a non-governmental consultative organization to the International Maritime Organization, an agency of the United Nations. CLIA actively monitors international shipping policy and develops recommendations to its membership on a wide variety of issues.

CLIA's member lines operate over 150 ships. In 2007, CLIA's members carried approximately 12.5 million passengers of which nearly 9.2 million passengers embarked in U.S. ports alone. The number of ports visited continues to grow each year. Many of CLIA's member lines' cruise ships reposition among multiple jurisdictions throughout each year, both in

the U.S. and abroad. A typical ship might spend the winter months cruising the Caribbean on voyages originating in Florida or Texas, embark passengers throughout the spring in Italy or Spain for Mediterranean cruises, and transfer to Canada for summer cruises embarking in Vancouver and visiting ports in Alaska. Of the 30 U.S. ports and numerous other foreign ports on which CLIA's member lines' vessels call, research shows the Caribbean, Alaska, Bahamas, Hawaii, and the Mediterranean/Greek Isles are top choices of cruisers. The ability of each individual state or subdivision to impose local fees and taxes is of central concern to CLIA's members given (1) the likelihood of multiple and inconsistent taxation by individual local governments, and (2) the possibility of retaliation by foreign ports against both American and other vessels calling abroad.

WSC and CLIA file this brief in support of Petitioner in order to provide perspective to the Court about the potential impacts on international commerce of the Court's actions here.

SUMMARY OF ARGUMENT

1. The prohibition against States' establishment of tonnage duties embraces all taxes and duties regardless of their name and form, whether measured by the tonnage of the vessel or not, which are in effect charges for the privilege of entering, trading in, or lying in a port. If this Court were to uphold the Valdez tax as valid under the Tonnage Clause, the implications for international shipping and commerce would be substantial. The Tonnage Clause on its face makes no distinction between State tonnage duties levied against U.S. documented vessels (the vessels covered by the Valdez tax) and State tonnage duties levied against vessels documented in other countries.

There is no textual basis for this Court in the Tonnage Clause context to draw a distinction between interstate commerce and foreign commerce in the way that it has drawn such a distinction in the Commerce Clause context. See *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 445-49 (1979). Thus, although the limitation of the Valdez tax to U.S. documented vessels plainly has implications for the apportionment issue raised by the second question presented, the Court's analysis under the Tonnage Clause will not be affected by the fact that Valdez's ordinance applies only to U.S. vessels. If States and municipalities may, under the Constitution, levy taxes on vessels for unspecified purposes where other personal property in the jurisdiction is not so taxed, the Tonnage Clause becomes a nullity, and the practice of the various States and municipalities charging vessels for the privilege of entering a port and serving the needs of the nation's commerce, which the Tonnage Clause was adopted to prevent, would likely proliferate.

2. On the issue of apportionment, the practice of taxing vessels on the high seas by a non-domiciliary jurisdiction on the basis that a vessel has at some point during a tax year acquired a tax situs in a particular port is one that has the potential to create great mischief in the field of international shipping. Amici urge reversal on this question on the grounds argued by Petitioner. In addition, however, amici urge the Court to be mindful of the additional factors applicable to Commerce Clause analysis in the context of international commerce that the Court articulated in *Japan Line*. Whatever this Court's decision with respect to Valdez's approach to apportionment as it applies to Petitioner's vessels, United States courts are not in a position to police alloca-

tions among nations that would necessarily arise with respect to vessels that are documented in or are owned by persons resident in nations other than the U.S. and that call ports in this country. See *Japan Line, Ltd.*, 441 U.S. at 447, 454.

ARGUMENT

1. The Valdez Levy is a Prohibited Tonnage Duty.

The Tonnage Clause "prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress." *Wheeling, P & C Transp. Co.* v. *Wheeling*, 99 U.S. 273, 277 (1879). Thus, "the only question which can properly arise in the case presented for decision [is] whether the tax as imposed by state authority is or is not a tonnage duty * * *." *Id.* at 279.

The Alaska Supreme Court answered the question of whether the Valdez charge was a tonnage duty in a circular fashion. Beginning with the truism that "[a] fairly apportioned property tax is not a tonnage duty," it found that the tax was fairly apportioned, and so it "necessarily also [held] that it does not violate the Tonnage Clause." Pet. App. 18a. The problem with this approach is that no tonnage duty may be saved by being "fairly apportioned." Because the Constitution's prohibition on States imposing "duties of tonnage" is unequivocal, the issue of apportionment plays no part in the determination of whether a levy is a permissible tax or a prohibited tonnage duty.

In order to determine whether a charge is a tonnage duty, it is necessary to look at how that charge operates in practice, not what it is called. See

Passenger Cases, 7 How. 283, 459 (1849) (opinion of Grier, J.) ("We have to deal with things, and we cannot change them by changing their names"). The "thing" here is a levy against only one type of personal property—oceangoing vessels. It appears that all other forms of personal property within the City of Valdez are either not covered by the tax or have been exempted. See Pet. at 16; Opp. at 11-12. It appears further that the parties agree that there are no specific services provided to the taxed vessels in exchange for the monies paid. If the analysis stopped there—a levy *only* on vessels with no services rendered in return—then the charge would clearly be a levy "upon the privilege of access by vessels * * * to the ports or to the territorial limits of a state," *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 265 (1935), and thus a prohibited tonnage duty.

Respondent argues, of course, that there is more to the analysis than the fact that the personal property tax in question applies only to ocean-going vessels and that no specific services are provided to the vessel in return. The additional consideration, according to Respondent, is that the money collected from the tax on the vessel is used to provide services to the general public, of which the employees of the Petitioner constitute a part. See Opp. at 8-9 (listing, for example, a hospital, post office, community college, arts council, etc. as beneficiaries of the tax).

This argument, like the Alaska Supreme Court's holding that a tax is not a tonnage duty if it is fairly apportioned, misses the crucial point. *Every* government levy, unless it is pilfered or squandered, is used to pay for the "advantages of a civilized society," *Exxon Corp.* v. *Wisc. Dep't of Rev.*, 447 U.S. 207, 228 (1980). The cases using such formulations to describe

the existence of a due process nexus with the tax payer have also uniformly held that the taxes involved must be non-discriminatory (i.e., they apply uniformly to broad classes of personal property) and fairly apportioned. See, e.g., *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1975). There is no Tonnage Clause case that upholds a targeted levy on vessels on the ground that the money so collected is used for governmental purposes, nor could there be. To say that a particular charge has some of the attributes of taxes that have been held to be permissible under the Commerce Clause and the Due Process Clause is not the same as saying that such a charge is not a tonnage duty. There is, in short, a fundamental flaw in the syllogism that says that: Permissible taxes are used for governmental purposes; our tax is used for governmental purposes; therefore our tax is permissible. That flaw, to repeat, is that *all* government levies are used for governmental purposes. That factor is therefore of no use in determining when an exaction is a permissible property tax and when it is an impermissible tonnage duty.

Stripped of the two logically and legally flawed bases of its Tonnage Clause holding, the Alaska Supreme Court's ruling stands on nothing. This Court should therefore reverse on that question. But this Court should reverse not merely because the State court's reasoning does not bear scrutiny, but rather because the Tonnage Clause becomes a nullity if it does not prohibit the duty collected by Valdez. As a practical matter, if the only attributes necessary for the avoidance of the absolute constitutional prohibition stated by the Tonnage Clause are that the State or local charge is apportioned among taxing jurisdictions and that moneys collected are spent by the government to provide general governmental ser-

vices, then any State or port in the country would be able to lay taxes on ships in order to support any government program, no matter how tangential (or nonexistent) the benefits of that program might be to the ships that pay the tax. That is precisely the evil that the Tonnage Clause was designed to prevent, and there is no line that can be drawn if that line is not drawn here.

2. Apportionment

In the event that the Court reaches the apportionment issue, amici urge reversal on the grounds argued by Petitioner. In addition, however, amici request that the Court remain mindful of its long-held distinction between interstate and international commerce in apportionment cases. *Japan Line* controls international commerce, and even if the charge here were held to be a permissible property tax that was fairly apportioned, that situation should be distinguished from a hypothetical tax that extends beyond the United States documented vessels reached by the Valdez tax.

In *Japan Line*, the Court added two additional considerations relevant to foreign-owned property used as an instrumentality of international commerce to the test set forth for interstate commerce in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977): (1) the enhanced risk of multiple taxation and (2) the need for the federal government to "speak with one voice." *Japan Line, Ltd.*, 441 U.S. at 446-49. These considerations are not implicated by the facts in this case, and the Court here, as it has before, should refrain from addressing what the outcome would be with respect to vessels of many nations operating in international commerce, where much stricter scrutiny is applied. See, e.g., *Ott* v. *Mississippi Valley Barge*

Line Co., 336 U.S. 169, 173-74 (1949) ("We do not reach the question of taxability of ocean carriage but confine our decision to transportation on inland waters"). As the Court noted in *Japan Line, Ltd.*, 441 U.S. at 447, "neither this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign." As the Court also stated there, *id.* at n.11, "[o]ceangoing vessels * * * are generally taxed only in their nation of registry," a statement that remains true today. The scope and complexity of ocean transportation services has only increased since *Japan Line* was decided (see "Interest" section, *supra)*, and the difficulty in managing apportionment has likewise increased.[2] Thus, in the event that the Court reaches the apportionment question, and in the event that it upholds the State court on that point, amici urge the Court to make clear that its holding does not extend to vessels engaged in international trade. Failure to make such a distinction under those circumstances could lead to a substantial risk of States and municipalities misunderstanding the constitutional limits on their ability to tax international shipping.

CONCLUSION

The charge that Valdez levies against ocean-going vessels is a prohibited tonnage duty. It singles out shipping, and no services beyond those provided to the populace at large are provided in return for the money collected. Other than in name, it is precisely

---

[2] The international commerce situation would also present a question, not presented here, of whether vessels calling for an average of a day at each U.S. port after voyages that can last many weeks would acquire a tax situs in any of the ports that they call in the U.S.

the sort of State and local tax on shipping that the Tonnage Clause was designed to prevent. The case should be resolved on that basis, and there is no need to reach the apportionment issue. If the Court does reach the apportionment question, it should limit its analysis to the facts here, under which the tax applies only to vessels documented in the United States, and the vessels in question typically serve only United States ports. The very different case of foreign-registered vessels in international trade was settled by *Japan Line*, and need not be revisited here.

Respectfully submitted,

LAWRENCE W. KAYE
ANDRÉ M. PICCIURRO
KAYE, ROSE & PARTNERS, LLP
402 W. Broadway
Suite 1300
San Diego, CA 92101
(619) 232-6555
Counsel for Amicus Curiae Cruise Lines International Association

MARC J. FINK
Counsel of Record
JOHN W. BUTLER
SHER & BLACKWELL, LLP
1850 M Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 463-2500
Counsel for Amicus Curiae World Shipping Council

February 2, 2009

PETITION FOR RE-HEARING

133

Supreme Court, U.S.
FILED
JUL 9 - 2009
OFFICE OF THE CLERK

17

No. 08-310

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Alaska

PETITION FOR REHEARING

WILLIAM M. WALKER
Counsel of Record
CRAIG W. RICHARDS
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

Counsel for Respondent

BOTH 45X5CA

69240 18

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

GROUNDS FOR REHEARING 1

CRITICAL ERRORS 2

I. OIL TANKERS CANNOT BE TAXED BASED ON A SINGLE ENTRY INTO PORT 2

II. AN AD VALOREM TAX ON OIL TANKERS AND OTHER VESSELS IS NOT CORRELATED TO ITS CARRYING CAPACITY 3

III. THE VALDEZ OIL AND GAS TAX IS A LOCAL TAX 3

A. How Alaska Stat. § 43.56, Alaska Stat. § 29.45 And VMC § 3.28 Interact 5

B. Errors As To How The Valdez Oil And Gas Tax And Valdez Vessel Tax Differ 6

1. State Versus Local Administration Of The Taxes 6

2. State Versus Local Determination Of Taxable Property And Exemptions 7

3. State Versus Local Collection Of Tax Revenues And Restrictions Thereof 8

4. State Versus Local Tax Rates And Maximum Revenues 9

C. The Court's Incorrect Conclusions "Mattered" 10

D. How Can The "Same Manner" Requirement Ignore 75.0% Of Valdez Property? 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

CASES

Ambler v. Whipple,
90 U.S. 278 (1875) 1

Bullock v. Dep't of Community & Reg'l Affairs, 19 P.3d 1209 (Alaska 2001) 4, 9, 10

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949), *reh'g granted*, 337 U.S. 910 (1949), *aff'd on reh'g*, 339 U.S. 605 (1950) 1

Reid v. Covert, 351 U.S. 487 (1956), *reh'g granted*, 352 U.S. 901 (1956), *aff'd on reh'g*, 354 U.S. 1 (1957) 1

Transportation Co. v. Wheeling,
99 U.S. 273 (1879) 1

CONSTITUTIONAL PROVISIONS

Alaska Const. art. IX, § 3 8

Alaska Const. art. IX, § 4 8

Alaska Const. art. X, § 2 8

STATUTES

Alaska Stat. § 29.45.010 9

Alaska Stat. §§ 29.45.010-.500 8

Alaska Stat. § 29.45.080 ..... 5, 9

Alaska Stat. § 29.45.110 10

Alaska Stat. § 29.45.210(d) 10

Alaska Stat. § 29.45.550 8

Alaska Stat. § 43.56 5
Alaska Stat. § 43.56.010(b) 8
Alaska Stat. § 43.56.010(c) 9
Alaska Stat. § 43.56.010(d) 5
Alaska Stat. § 43.56.060(b) 5, 6
Alaska Stat. § 43.56.060(g) 7
Alaska Stat. §§ 43.56.110-.130 7
Alaska Stat. § 43.56.210(5) 6
Fla. Stat. § 193.052 (2008) 6
Iowa Stat. § 434.1 (2008) 6
Iowa Stat. § 445.2 (2008) 6
Mont. Stat. § 15-23-101 (2008) 7
Mont. Stat. § 15-23-102 (2008) 7
Utah Stat. § 59-2-201 (2008) 7
Valdez Municipal Code § 3.12.020 2
Valdez Municipal Code § 3.12.040-.050 11
Valdez Municipal Code § 3.28.010 ..... 3, 6

OTHER AUTHORITIES

Alaska Taxable 2000 (2001), *at* http://www.commerce.state.ak.us/dca/osa/pub/00Taxable.pdf 11

PETITION FOR REHEARING

The City of Valdez ("City") petitions for rehearing of the Court's June 15, 2008 decision. Specifically, it seeks an order (1) granting rehearing and (2) remanding the case to the Alaska Supreme Court. If the Court is unwilling to remand the case for better development of the record as to facts and the nature of Alaska law and tax policy, the City would alternatively request the case be set for reargument.

GROUNDS FOR REHEARING

Although rehearing is rarely granted, this case meets the exception contemplated in Sup. Ct. R. 44.1 – and articulated in *Ambler v. Whipple*, 90 U.S. 278, 282 (1875) – that if "the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument."[1]

The City does not challenge the Court's interpretation of the Tonnage Clause, Art. I, 10, cl 3, or its prior precedent, primarily *Transportation Co. v. Wheeling*, 99 U.S. 273, 284 (1879), that the constitution forbids the taxation by a state or municipal government of vessels as property where vessels are not taxed in the same manner as other property of its citizens. Slip Op. 9. Rather the City respectfully submits that the insufficient transcript before the Court resulted in it drawing several erroneous conclusions. These errors in turn led the Court to improperly decide that the City does not tax vessels in

[1] *Reid v. Covert*, 351 U.S. 487 (1956), *reh'g granted*, 352 U.S. 901 (1956), *aff'd on reh'g*, 354 U.S. 1 (1957); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949), *reh'g granted*, 337 U.S. 910 (1949), *aff'd on reh'g*, 339 U.S. 605 (1950).

the same manner as other property, and thus the City's tax on vessels under Valdez Municipal Code ("VMC") § 3.12.020 and Resolution No. 00-15 (together "Valdez Vessel Tax") violated the Tonnage Clause.

CRITICAL ERRORS

The three areas where the Court made critical errors relate to: (1) whether oil tankers can be taxed based on a single entry into port; (2) whether an ad valorem property tax is correlated with cargo capacity; and (3) the differences between the Valdez Vessel Tax and the City's tax on real and personal oil and gas property, including whether the latter is a state or local tax.

I. OIL TANKERS CANNOT BE TAXED BASED ON A SINGLE ENTRY INTO PORT.

Petitioner first argued that a single entry into port invariably subjects a tanker to the Valdez Vessel tax in its Reply Brief at 6. Thus Valdez could not correct this statement in briefing. Since it was not clarified at oral argument, the Court chided the City for not identifying vessels that both entered the port and failed to establish a tax situs. Slip Op. 8

But it is legally and factually impossible for the City to tax a vessel based upon one entry into port. That is because the City's allocation formula uses "the number of days spent in each port during the year prior to the tax." Resolution No. 00-15. Since apportionment is based on the *prior year's activity*, it is only as of January 1 in the calendar year after a vessel first enters the Valdez service that a vessel can be taxed. *See, e.g.*, J.A. 39 (where the Polar Endeavor was first taxed in 2002 notwithstanding it spent 26 days in Valdez in 2001). And when a vessel

leaves the Valdez service it is removed from the roll for the following year. Examples where a tanker visited Valdez in the year prior to their removal from the roll would be the Polar Independence (1999/2000), Polar Spirit (1999/2000), and Polar Trader (2001/2002). J.A. 21-45.

Petitioner's vessels are constructed for and dedicated to the Valdez crude trade, but nonetheless if some hypothetical vessel first called on Valdez in January, and throughout the year, but left the Valdez service before December 31 of that year, then it is a mathematical certainty the vessel would not be subject to the Valdez Vessel Tax.

II. An Ad Valorem Tax On Oil Tankers And Other Vessels Is Not Correlated To Its Carrying Capacity.

The Court found, "The ordinance applies almost exclusively to oil tankers. And a tax on the value of such vessels is closely correlated with cargo capacity." Slip Op. 7. However, the transcript before the Court did not contain any evidence on this issue, and Respondent should have the opportunity to establish a record demonstrating that value is not correlated with cargo capacity. Consider, for instance, that in 2002 the Polar Alaska, with a dead weight tonnage of 188,436 but nearing the end of its remaining life, had a value of $19,520,000; however, the Polar Resolution, a new, smaller vessel with 2/3 the dead weight tonnage of 124,199, had ten times the value of $192,416,000.

III. The Valdez Oil And Gas Tax Is A Local Tax.

As authorized by Alaska Statutes Title 43, Chapter 56, and implemented by VMC § 3.28.010, the City

levies a tax on real and tangible personal property used in oil and gas exploration, production and pipeline transportation ("Valdez Oil and Gas Tax"). Respondent identified it taxes personalty under the Valdez Oil and Gas Tax in its Brief in Opposition to Certiorari at 11 (and in its Brief for Respondent at 3 and 24). However, Petitioner did not address this point in its reply petition or initial merits brief, instead waiting until its Reply Brief at 12 to assert for the first time that the Valdez Oil and Gas Tax was a "statewide tax." Thus Respondent did not get to address and brief whether the tax was a local or state tax, including that the Alaska Supreme Court has recognized, "Alaska Statute 43.56 . . . authorizes both the state and municipalities to tax oil and gas property for their operating budgets." *Bullock v. Dep't of Community & Reg'l Affairs*, 19 P.3d 1209, 1211 (Alaska 2001).

However, by oral argument it was evident the question on which the Court accepted certiorari[2] presupposed issues of fact and Alaska law in dispute, and that the Court was confused about whether the Valdez Oil and Gas Tax was a City tax on personalty.

For instance, Justice Breyer queried:

> Do you think what I said [that it's Alaska's tax] was a misdescription? What's worrying me about this aspect of this case is a possible need to send it back to find out what Alaska's tax system is. Now – now, if what I just said is a – is a correct description approxi-

---

2 "Whether a municipal personal property tax that falls exclusively on large vessels . . . violates the Tonnage Clause." Pet. Br. i.

> mately and if the other side thinks it is, too, then at least I – I know how to go about deciding it. And if I don't, I don't know quite what to do.

Tr. 15:18-25.

Nonetheless the Court went ahead and decided the matter to "reduce the likelihood of further litigation." Slip. op. 9. But given the paucity of the transcript before the Court the case should have been remanded to the Alaska courts for a determination as to the interplay and critical differences between the Valdez Vessel Tax and Valdez Oil and Gas Tax. The Court's failure to remand this case resulted in numerous incorrect conclusions about Alaska law and tax practice that in turn led to the Court striking down the Valdez Vessel Tax.

A. How Alaska Stat. § 43.56, Alaska Stat. § 29.45 And VMC § 3.28 Interact.

Raised for the first time in Petitioner's Reply Brief at 12, the state versus local tax characterization was not briefed to this Court. As background, although Alaska Stat. § 43.56 is a statewide tax, the legislature adopted a provision in both Title 45 and Title 29 allowing municipalities to tax the same oil and gas property at the local level. Alaska Stat. § 43.56.060(b) ("A municipality may levy and collect a tax under AS 29.45.080 at the rate of taxation that applies to other property taxed by the municipality."); *id.* § 29.45.080.

But even though the legislature allowed for both local and State levies it did not provide for overlapping taxation (although it could have), instead granting owners a credit against State taxes equal to the amount paid municipalities. Alaska Stat. § 43.56.010(d). However, if a municipality taxes a

taxpayer in excess of what the State collects, the credit is capped to prevent the State from bearing the burden of local taxation. *Id.*

Valdez enacted its tax on oil and gas property under VMC § 3.28.010. Thus the City levies a tax on real and tangible personal property used in oil and gas exploration, production and pipeline transportation, including such diverse chattel as motor vehicles, heavy equipment, aircraft, vessels, office furniture and supplies, and personalty used in the operations of oil marine terminals such as oil spill response equipment, small tools, pipeline pigs, and spare parts. Alaska Stat. § 43.56.210(5).

B. Errors As To How The Valdez Oil And Gas Tax And Valdez Vessel Tax Differ.

Suffering from an insufficient record and inadequate briefing, the Court sua sponte made several incomplete and inaccurate determinations about the nature of the Valdez Oil and Gas Tax.

1. State Versus Local Administration Of The Taxes.

The Court indicated that since the "State issues assessment notices . . . and resolves evaluation disputes" this suggests the Valdez Oil and Gas Tax is a state-level tax and not a local tax. Slip op. 11. However, Respondent had no opportunity to brief that, to insure uniformity in assessment, dozens of states like Alaska centrally administer local levies on common carrier and public utility property that – like pipelines – cross multiple taxing jurisdictions.[3] The

---

[3] *See, e.g.*, Fla. Stat. § 193.052 (2008) (value of state assessed railroads reported to counties); Iowa Stat. §§ 434.1 and 445.2

[Footnote continued on next page]

Court's ad hoc suggestion that it is constitutionally significant whether a state or local community administers a local levy unsettles basic principles of state and local taxation.

Additionally the Court is unaware that the City, like other Alaskan municipalities, actively participates in the oil and gas assessment process. This includes providing information about property to inform the assessment, and appealing assessments for judicial review. *See* Alaska Stat. § 43.56.110-.130. Further, "The Department may enter into agreements with a municipality for the cooperative or joint administration of the assessing authority conferred on the department by this section." *Id.* § 43.56.060(g). Although again outside of the record, the State jointly administers its assessment authority with the impacted municipality for most (but not all) oil and gas property in Alaska.

2. State Versus Local Determination Of Taxable Property And Exemptions.

It was stated that "the City alone determines what property is subject to the [Valdez Vessel Tax]" while, for the Valdez Oil and Gas Tax the "State determines the type of property subject to the tax" and "forbids the municipality to exempt any property it designates as taxable . . ." Slip Op. 11-12. But these statements do not reflect that the City's taxing au-

---

[Footnote continued from previous page]

(2008) (taxes on state assessed public utilities collected by county); Mont. Stat. §§ 15-23-101, 102 (2008) (same); Utah Stat. § 59-2-201 (2008) (counties collect taxes on their levy on state assessed pipelines).

thority is a regimented delegation of taxing power from the State.

In Alaska the legislature has the constitutional power to set assessment standards, define property tax exemptions, and delegate taxing power to municipalities.[4] Alaska Stat. § 29.45.550 authorizes Valdez to assess, levy and collect a property tax only as provided in Alaska Stat. §§ 29.45.010-.500. Those sections define what property Valdez may tax, the method of valuation, the allowed range for the rate of taxation, and the process relating to administration, collection and challenge of adopted property taxes. Thus although the State defines what oil and gas property a municipality may tax, and applicable exemptions, a review of Title 29, Chapter 45 demonstrates the legislature applies similarly narrow boundaries on other classes of property subject to municipal taxation (including mandatory and optional exemptions). The Alaska courts should be allowed to clarify this critical aspect of Alaska law.

3. State Versus Local Collection Of Tax Revenues And Restrictions Thereof.

The Court accurately identified that for the Valdez Vessel Tax the City collects "and (as far as we can tell) keeps the revenue without any restrictions." Slip op. 11. But the same is true for taxes from the Valdez Oil and Gas Tax, which are paid directly to the City by the taxpayer pursuant to Alaska Stat. § 43.56.010(b) (taxes are to be "paid to a municipality"). Thus the Court's finding that revenue on oil and gas property is raised by the State and "shared with the City", slip op. 11, is factually incorrect; all

---

[4] Alaska Const. art. IX, §§ 3, 4 and art. X, § 2.

local levies on oil and gas property are paid directly to the municipality by the taxpayer without restrictions being imposed on the expenditure of the funds by the State.

4. State Versus Local Tax Rates And Maximum Revenues.

Alaskan municipalities only levy at one area-wide mill rate, including for oil and gas property. Alaska Stat. § 29.45.010; *id.* § 43.56.010(b). But as to the Valdez Oil and Gas Tax the Court stated: (a) the "State regulates the rate of taxation that may be applied to property it designates as taxable;" and (b) "the State, while permitting the municipality to set the precise tax rate and to collect the tax, imposes certain kinds of limits upon the amount of the resulting revenue that a municipality may raise that, in effect, provide a check against excessive rates." Slip op. 11-12. The Court was referring to Alaska Stat. § 43.56.010(c) and Alaska Stat. § 29.45.080, which cap a municipality's property tax revenues, if they enact a levy on oil and gas property, on a per capita basis. But the Court is incorrect in suggesting that taxes on oil and gas property are subject to rate or revenue limitations different from that which applies to other municipal property. In *Bullock*, 19 P.3d at 1211, it was affirmed that when the revenue cap is reached, "the municipality should reduce both the value of oil and gas property and locally assessed property, in equal proportions." Thus the rate and revenue limitations referred to by the Court apply in the same manner to the Valdez Vessel Tax and the Valdez Oil and Gas Tax.

C. The Court's Incorrect Conclusions "Mattered".

Under Alaska law the City taxes both vessels and oil and gas personal property.[5] Nonetheless the Court felt the differences it drew between the Valdez Oil and Gas Tax and the Valdez Vessel Tax "matter" for purposes of determining whether or not the Valdez Vessel Tax violates the Tonnage Clause. Slip op. 12. Since there were numerous errors and omissions in the Court's findings as to these differences justice demands rehearing.

For example, the Court stated if the Valdez Oil and Gas Tax were burdensome to an owner of movable property it must complain to the State, while under the Valdez Vessel Tax an owner must complain to the City as to the rate, valuation, or assessment of the tax. *Id.* But, as shown, tax rates and revenues are established and capped in the same manner for both taxes. Similarly, when the Court found central versus local administration of property taxes had constitutional significance, it considered neither: (a) that local levies on multi-jurisdictional properties are assessed centrally by most states; nor (b) the nuances of municipal involvement in the State's assessment process. The Court also failed to recognize that as part its delegation of taxing power the State defines assessment, valuation, and appeal standards (including judicial review) for the Valdez Vessel Tax just as it has for personalty taxed under the Valdez Oil and Gas Tax. Alaska Stat. § 29.45.110; *id.* § 29.45.210(d).

And the Court's mischaracterization of the Valdez Oil and Gas Tax as non-local led directly to its

---

[5] *Bullock*, 19 P.3d at 1211.

determination that the assessment underlying the Valdez Vessel Tax was not in the same manner as that for oil and gas personalty, and thus not subject to the same electorate-related checks. But Valdez's levies under both the Valdez Vessel Tax and Valdez Oil and Gas Tax are subject to the identical electorate-related check in the form of the legislative delegation to the City of its taxing power.

D. How Can The "Same Manner" Requirement Ignore 75.6% Of Valdez Property?

In 2000, a typical tax year, there was $919,309,050 in taxed property in Valdez, $623,410,970 (67.8%) from oil and gas property, $94,990,487 from vessels (10.3%), and $200,907,593 (21.9%) from other real property. Alaska Taxable 2000 35 (2001), *at* http://www.commerce.state.ak.us/dca/osa/pub/00Taxable.pdf. Once vessels are removed from the total, a staggering 75.6% of the value of taxable property and tax revenue in Valdez comes from oil and gas property. This is true even though the City has an extremely broad property tax – with virtually no exemptions[6] – on all residential and commercial real property, and taxes oil and gas property at the same rate as all other property.

The dilemma the City thus faces is how to tax vessels in the same manner as other property of its citizens, when the Court has erroneously concluded the City is to disregard in its analysis how it taxes 75.6% of that property.

---

[6] It grants two real property exemptions not required by law: (a) $20,000 for each principal taxpayer residence; and (b) exemptions for non-profit community purpose property. VMC §§ 3.12.040–.050.

CONCLUSION

The Court should grant remand for proper development of the transcript, or at least provide for additional briefing, to allow the Court to be fully informed as to the critical factors cited in this Petition for Rehearing. To do otherwise would work a grave injustice on the City of Valdez and its residents.

Respectfully submitted.

WILLIAM M. WALKER
Counsel of Record
CRAIG W. RICHARDS
WALKER & LEVESQUE, LLC
731 N Street
Anchorage, AK 99501
(907) 278-7000

Counsel for Respondent

July 9, 2009

No. 08-310

IN THE

Supreme Court of the United States

POLAR TANKERS, INC.,

Petitioner,

v.

CITY OF VALDEZ,

Respondent.

CERTIFICATE OF GOOD FAITH

I hereby certify that I am a member in good standing of the bar of this Court and that on this 9th day of July, 2009, I caused to be filed a Petition for Rehearing. The Petition for Rehearing is presented in good faith and not for delay.

William M. Walker